Montana Law Review

Volume 71
Issue 2 *Summer 2010*

Article 10

7-2010

Synopses of Past Articles in the Montana Law Review Discussing the 1972 Montana Constitutio n (1972-2009)

SYNOPSES

SYNOPSES OF PAST ARTICLES IN THE *MONTANA LAW REVIEW* DISCUSSING THE 1972 MONTANA CONSTITUTION (1972–2009)

In advance of the 2010 vote on whether a constitutional convention should be called in Montana, the editors and staff have collected and synopsized all articles from the *Montana Law Review* published between 1972 and 2009 that discuss the Montana Constitution. We hope this collection will be a useful resource for researchers, practitioners, and citizens alike.

TABLE OF CONTENTS

The Legislative Assembly in a Modern Montana Constitution[1]—
Ellis Waldron

This article explores the constitutional framework for the Montana Legislative Assembly. The author argues a representative assembly is the crucial component of a modern state government. The three most important functions of such a representative assembly are: (1) to review proposals of law; (2) to regulate state government activity via taxation and public expenditures; and (3) to provide a check against other branches of government, particularly the executive. Creation of a legislature that can successfully perform these functions requires consideration of structural issues, such as the size and number of houses, districting, apportionment, frequency of sessions, and compensation. A strong executive is necessary to balance the growing national bureaucracy, and an independent legislature is necessary to provide a check on the executive.

Montana's constitutional foundations hinder the Legislative Assembly from performing these vital functions. In order to create a more flexible and effective legislative institution, the legislative article should create a unicameral structure with approximately 75 members (from single member districts) who meet in January of odd-numbered years. A bipartisan com-

1. Ellis Waldron, *The Legislative Assembly in a Modern Montana Constitution*, 33 Mont. L. Rev. 14 (1972).

mission should re-evaluate apportionment each decade. Additionally, members should earn an annual salary, modest per diem expense reimbursements, and generous travel reimbursements. Finally, the legislative article should contain language granting traditional legislative immunity and the power (via statute) to make maximum use of technology.

Constitutional Control of the Montana University System: a Proposed Revision[2]—Laurence R. Waldoch

This article analyzes the meaning and effect of Article XI, § 11 of the 1889 Montana Constitution,[3] which gives control over the state universities and educational institutions to the state Board of Education. The provision is analyzed in light of decisions from other states regarding the control of state universities. The author argues that the 1889 Constitution failed to give sufficient authority to the Board of Regents and proposes a revision that would provide such authority.

As provided in Article XI, § 11, the Board of Regents' "powers and duties shall be prescribed and regulated by the law . . . ."[4] This implies there will be differences between autonomous universities and those that are legislatively controlled. The author provides an examination of these differences, as well as the role and scope of the Board of Regents' fund disbursement for higher education.

According to the author, delegates of the 1972 Constitutional Convention should draft a clause that encourages the court to apply factors that other jurisdictions have used to uphold the constitutionality of statutes affecting regents. The author concludes by proposing an example of such a clause and argues that the new Constitution must attempt a better balance between the autonomy of the Board of Regents and reasonable oversight by the Legislature.

Apportionment: Past to Future[5]—John Dudis

This article discusses the history of reapportionment (attempts to change the way voting districts are delineated) in America politics and suggests a reapportionment plan for Montana to adopt. The article begins by tracing the history of the judiciary's refusal to consider reapportionment. Then, the author cites several cases from the U.S. Supreme Court finding

2. Laurence R. Waldoch, *Constitutional Control of the Montana University System: A Proposed Revision*, 33 Mont. L. Rev. 76 (1972).

3. Mont. Const. art. XI, § 11 (1889).

4. *Id.* at art. XI, § 11.

5. John Dudis, *Apportionment: Past to Future*, 33 Mont. L. Rev. 101 (1972).

states' reapportionment plans unconstitutional, culminating with *Baker v. Carr*.[6]

The article goes on to discuss the states' failed legislative attempts to respond to the Supreme Court's rulings. The author proposes possible options for how states can reapportion voting districts, including allowing individual state legislatures to reapportion themselves, simple state legislative inaction, and calling state constitutional conventions. The author then discusses reapportionment in Montana, alluding to various unsuccessful attempts to pass legislation that would have reformed reapportionment. When Montana finally passed a bill reforming reapportionment, it was immediately found to be unconstitutional. The Legislature redrafted the bill, and at the time of the publication of this article, the bill had not yet been constitutionally adjudicated.

The final section of the article discusses a proposal for the new Montana Constitution. Suggestions include: Montana adopting a "single" member districted system; excluding from the definition of a "population," foreign aliens, non-taxable Indians, and servicemen on active duty; and including a financial reimbursement provision for commission members to be enacted through enabling legislation.

Revenue and Taxation in the Montana Constitution: Present and Proposed[7]—P. Bruce Harper

This article analyzes difficult and ambiguous fiscal sections of the 1889 Constitution[8] in light of judicial decisions construing them. The article examines the economic, political, and philosophical factors contributing to the complexity of the 1889 fiscal provisions. The author contends that only in closely examining the cases construing the Constitutional provisions can one sift through the vagaries and find their actual meaning.

The author begins by placing Montana's 1889 Constitution in a class of documents of that period, stating that it is ambiguous and more concerned with limiting government than achieving positive, constructive goals. Moving to the Constitution itself, the author first explores the Equality and Uniformity Clause,[9] then the Classification Clause[10] in light of judicial interpretation.

The article then examines the various exemptions to taxation under the Constitution, including exemptions for public property, local property, and

6. *Baker v. Carr*, 369 U.S. 186 (1962).

7. P. Bruce Harper, *Revenue and Taxation in the Montana Constitution: Present and Proposed*, 33 Mont. L. Rev. 126 (1972).

8. Mont. Const. art. XI, § 11 (1889).

9. *Id.* at art. XII, § 1.

10. *Id.* at art. XII, § 11.

corporate property. The author then briefly examines the remaining fiscal provisions of Article XII. The article concludes by suggesting that the drafters of the new Constitution avoid the temptation to place specific and elaborate fiscal guidelines in the document, leaving the Legislature largely responsible for such decisions.

Local Government: Old Problems and a New Constitution[11]—
James D. Moore

This article presents an overview of local government dilemmas, possible approaches to metropolitan and area-wide problems, and recent constitutional attempts to free local governments from traditional obstacles. The article focuses on the contention between the emerging centralized state government and the traditional preference that local matters be governed by local officials.

The article explores some of the present approaches taken when dealing with the difficulties posed by the contention between state and local governance. Among these approaches, the author discusses: annexation; consolidation; extraterritorial powers; intergovernmental agreements and transfer of functions; special districting; federation; the metropolitan council; and establishing a planning agency.

The author then examines the purpose, as well as the most effective means of drafting a local government provision for the Montana Constitution. The author then lists factors to be taken into consideration when drafting the local government provision of the Montana Constitution. Finally, the author provides an example of what he believes to be an appropriate draft of such a provision.

"Public Trust" as a Constitutional Provision in Montana[12]—
Bill Leaphart

This article takes the form of a proposal to the Montana Constitutional Convention. The author begins by stating that because Montana is drafting a new constitution (in 1972); it is in a unique position to become perhaps the most progressive state in the field of constitutional guarantees for its environment. The article suggests that the imputation of the Public Trust Doctrine into the Montana Constitution is necessary in order to adequately ensure environmental protection in the future.

---

11. James D. Moore, *Local Government: Old Problems and a New Constitution*, 33 Mont. L. Rev. 154 (1972).

12. Bill Leaphart, *"Public Trust" as a Constitutional Provision in Montana*, 33 Mont. L. Rev. 175 (1972).

The author begins by examining the origins and history of the Public Trust Doctrine, starting with its use in Roman and English common law. The author then follows the development of the Doctrine through the 19th Century Supreme Court decisions interpreting it. Finally, the author discusses the Doctrine's use in the 20th Century by Wisconsin and Massachusetts courts in protecting their resources.

The author then cites two states, Alaska and Hawaii, which have provisions similar to that which he is proposing. Despite the rarity of states incorporating the Public Trust Doctrine into their constitutions, the author advocates for the use of the Doctrine at the constitutional level in Montana. The author concludes by providing an example of what Montana's constitutional provision should look like.

Montana Water Rights—A New Opportunity[13]—Albert W. Stone

This article explores the Montana Constitution's recognition and confirmation of "all existing water rights."[14] Specifically, the author discusses problems associated with confirming and recognizing existing water rights. In order to create clarity in Montana's water laws, the author suggests the Legislature needs to focus on making improvements in three areas of the law. First, there must be a conclusive ascertainment of existing rights because current water right records are virtually useless. Second, future water rights must be acquired by permit. According to the author, in addition to providing for a final determination and adjudication of existing water rights, newly acquired rights need to be equally definite, certain, and in the public record. Finally, the administration of water rights should be recognized as an administrative, rather than a judicial task.

The Montana Law of Valuation in Eminent Domain[15]—John F. Sullivan

This article provides an exclusive look at how Montana approaches the issue of real property valuation in eminent domain proceedings. This article only discusses the valuation of real property taken or damaged in condemnation. Generally, the following four topics are covered throughout the article: (1) what the standard of valuation is; (2) how this standard is applied to property taken or damaged in condemnation; (3) permissible evidence of value in a typical condemnation proceeding; and (4) who has the burden of proof.

13. Albert W. Stone, *Montana Water Rights – A New Opportunity*, 34 Mont. L. Rev. 57 (1973).

14. Mont. Const. art. IX, § 3.

15. John F. Sullivan, Student Author, *The Montana Law of Valuation in Eminent Domain*, 34 Mont. L. Rev. 90 (1973).

Montana's Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner."[16] Just compensation is an equitable standard, measured by the traditional flexible principles of equity, and no one formula of measurement applies universally to all cases. This article highlights three standards by which just compensation could be measured: (1) value of the property to the taker; (2) value of the property to the owner; and (3) market value. In Montana, market value is the usual standard for measuring just compensation. For the most part, Montana's law of valuation in eminent domain is the same as that of most other jurisdictions.

Justice Court Reform in Montana[17]—Lon T. Holden

This article examines deficiencies existing in Montana's justice court system in light of Article VII, § 5 of the Montana Constitution, which reaffirms the constitutional status of justice courts.[18] According to the author, the passage of Montana's new Constitution and its ultimate validation by the Montana Supreme Court make change in Montana's justice court system inevitable.

Under Montana's new Constitution, the Legislature is mandated to establish qualifications for the office of justice of the peace.[19] This article sets forth several suggested qualifications for the Legislature to consider, including: (1) a requirement that justices of the peace be U.S. Citizens; (2) a requirement that justices of the peace be residents in the county where election is sought; (3) a minimum age requirement; and (4) a requirement that justices of the peace be attorneys.

This article also addresses several criticisms leveled at the Montana justice court system, such as the lack of adequate quarters in which justices can handle their caseloads, inadequate compensation for justices, and the lack of a supervising authority. The article concludes with the author urging the Legislature to reform Montana's justice court system.

16. Mont. Const. art. III, § 14.

17. Lon T. Holden, Student Author, *Justice Court Reform in Montana*, 34 Mont. L. Review 122 (1973).

18. Mont. Const. art. VII, § 5.

19. *Id.*

The Passing of Sovereign Immunity in Montana: The King is Dead![20]—Barry L. Hjort

The 1972 Montana Constitutional Convention adopted Article II, § 18, which waives the State's sovereign immunity without limitations.[21] Previously, Montana's Constitution neither authorized nor prohibited sovereign immunity. For almost 50 years the Montana Supreme Court and Legislature roughly defined the bounds of sovereign immunity. Disrupting these precedents, the 1972 Constitution waived the State's immunity from any suit for injury to person or property. The complete abolition of sovereign immunity, however, is too simplistic and an illogical alternative to unlimited sovereign immunity.

In the realm of tort liability, government entities are not identical to private entities because some government undertakings, such as law enforcement and fire fighting, are inherently dangerous. In the State's pursuit to govern, it sometimes inflicts unavoidable damage on private parties. Article II, § 18 places a duty on all government entities to safeguard against liability by obtaining insurance and acting with extreme caution where liability might arise. However, there remains an uncomfortable uncertainty of increased litigation against the State. The Legislature should remedy this predicament by amending § 18 to allow reasonable limitations to the absolute bar of sovereign immunity. An amendment would allow the government to employ sovereign immunity in limited, specified areas to prevent the disruption of state operations.

A Constitutional Remedy for Injured Employees[22]—Gerald B. Murphy

The 1972 Montana Constitutional Convention included § 16 in the State Constitution's Declaration of Rights.[23] Section 16 provides for the equal and speedy administration of justice, except for injured employees whose immediate employer provides workmen's compensation coverage. In effect, § 16 still allows an employee of an independent contractor to bring a third-party liability suit against the general employer. Prior to the adoption of § 16, judicial interpretation of the Workmen's Compensation Act barred a third-party employee from bringing a claim against a general contractor if that employee's immediate employer participated in the Workmen's Compensation program.

20. Barry L. Hjort, *The Passing of Sovereign Immunity in Montana: The King is Dead!*, 34 Mont. L. Rev. 283 (1973).

21. Mont. Const. art. II, § 18.

22. Gerald B. Murphy, Student Author, *A Constitutional Remedy for Injured Employees*, 35 Mont. L. Rev. 119 (1974).

23. Mont. Const. art. II, § 16.

In 1965, the Legislature amended Montana's Workmen's Compensation Act to preclude explicitly general employers from liability. In response, many advocated the adoption of article II, § 16. The 1972 Convention's Bill of Rights Committee agreed that the status of workmen's compensation law violated the spirit of a speedy remedy. However, the adoption of § 16 reversed judicial and legislative interpretations of the Workmen's Compensation Act. Although the State should grant all injured persons a full and speedy remedy, the change in workmen's compensation law exposed general employers to liability that they had previously avoided.

The Legal Status of the Montana University System under the New Montana Constitution[24]—Hugh V. Schaefer

The adoption of Article X, § 9 by the 1972 Montana Constitutional Convention significantly changed the structure of the higher educational system.[25] Previously, Article XI, § 11 provided only for the supervision of the university and state educational institutions by a single Board of Education.[26] Article X, § 9 created two separate Boards of Education, one for higher education and one for elementary and secondary education. The delegates to the Convention sought to release the Board from excessive legislative control by allowing the Board to define its own powers and duties. Consequently, the Board of Regents for Montana's university system has become its own constitutional department, far out-reaching the powers of the prior Board of Education, whose powers relied solely on legislative mandate.

The Board has full power to manage and control higher education, and the possibility of limiting the scope of the Board's autonomy seems remote. Because judicial precedent has long upheld the Legislature's intent to vest the Board with substantial autonomy,[27] the Board is not subject to legislation prior to the adoption of Article X, § 9 concerning its duties and powers. The 1972 Constitutional Convention established a quasi-independent department and subjected the Board of Regents only to indirect legislative and executive control of audits, apportionment, and appointments.

24. Hugh V. Schaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 Mont. L. Rev. 189 (1974).

25. Mont. Const. art. X, § 9.

26. Mont. Const. art. XI, § 11 (1889).

27. *State ex rel. Veeder v. St. Bd. of Educ.*, 33 P.2d 516 (1934).

The Role of the Montana Supreme Court in Constitutional Revision[28]— Ellis Waldron

Article II, § 2 of the Montana Constitution grants the citizenry the right to alter the Constitution.[29] However, this clear grant of power may be symbolic rather than determinative given the activist role the Court has played in the history of constitutional revision. Early on, the Court assumed authority over the amending process. The Court first involved itself when it nullified three of the five amendments proposed at the beginning of Montana's statehood. Similarly, the Court was markedly involved during the adoption of Montana's 1972 Constitution.

Although Article XIX, § 8 of the 1889 Constitution provided basic guidance for the revision process, there was much room for the Court's interpretation.[30] The 1971 Legislature invited the Court to make initial judgments concerning the process, including the election and power of delegates, and expenditures for voter education. However, the Court's decisions did not rest on any provision of Article XIX and were often contrary to constitutional interpretation in other states. Although it may be difficult for the Court to make such decisions in the heat of political debate, the justices are obligated to base their decisions on sound constitutional premises when delving into the center of constitutional revision.

Eminent Domain: Exploitation of Montana's Natural Resources[31]— James M. Kaze

This article traces the history of eminent domain in Montana with special emphasis on the use of condemnation in exploiting natural resources. Specifically, the article discusses the differences between treating natural resources under a public benefit theory and under a public use theory. The 1889 Constitutional Convention discussed eminent domain due largely in part to concerns about adequacy of water for irrigation. Focusing on water use, the framers declared it a public use subject to the condemnation power. Legislative and judicial misapplication of this sentiment led Montana to embrace a system where any proposed taking of private property without the owner's consent could be upheld in court upon a showing that the condemned property would benefit the public in some way. By defining public

28. Ellis Waldron, *The Role of the Montana Supreme Court in Constitutional Revision*, 35 Mont. L. Rev. 227 (1974).

29. Mont. Const. art. II, § 2.

30. Mont. Const. art. XIX, § 8 (1888).

31. James M. Kaze, Student Author, *Eminent Domain: Exploitation of Montana's Natural Resources*, 35 Mont. L. Rev. 279 (1974).

use as equivalent to public benefit, the courts eliminated the constitutional limitations on eminent domain.

The 1972 Constitution led Montana toward a public use theory by granting the public ownership of the State's water and directing the Legislature to provide for the administration and control of water rights.[32] Finding it unlikely that Montana will abandon the public benefit doctrine, the author urges the Legislature to plainly define the limits of the power of eminent domain. He asserts that state administration of the condemnation power allows the public to decide the preferred public uses of valuable natural resources and prevents eminent domain from being exercised to exploit resources solely for profit.

Equality for Men and Women, Three Approaches: Frontiero, *The Equal Rights Amendment, and the Montana Equal Dignities Provision*[33]—Joan Uda

This article advocates for judicial activism in interpreting the equal dignities provision in the 1972 Constitution[34] as an expansive guarantee of gender equality. Progress made toward the equality of women on the national level should not be a substitute for under-enforcing Montana's equal dignities provision. Although sex as a classification became quasi-suspect under *Frontiero v. Richardson*,[35] the Supreme Court was not willing to apply strict scrutiny. In addition, Montana should not rely on the proposed federal Equal Rights Amendment because it addresses only state action.

Documents from Montana's Constitutional Convention illustrate the intent of the framers to eliminate discrimination based on sex without waiting for a federal Equal Rights Amendment, which would not explicitly provide as much protection as Montana's equal dignities provision. That provision is directed not only at state action but also private actions not reached by the Fourteenth Amendment. The article discusses which private actions the framers intended to cover under the equal dignities provision and what they meant by "civil or political right." This would, at minimum, include any rights protected by the federal Constitution and acts of Congress. Montana need not wait either for the Supreme Court to acknowledge sex as a suspect classification or for the passage of the Equal Rights Amendment when the State's guarantee is more broad and superior in scope.

---

32. Mont. Const. art. IX, § 3.

33. Joan Uda, Student Author, *Equality for Men and Women, Three Approaches:* Frontiero, *The Equal Rights Amendment, and the Montana Equal Dignities Provision*, 35 Mont. L. Rev. 325 (1974).

34. Mont. Const. art. II, § 4.

35. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Recent Developments in Montana Land Use Law[36]—James H. Goetz

This article discusses developments in land use law, focusing on attempts to counter the effects of population expansion, urban sprawl, and recreational development. The article touches briefly on many aspects of land use law. The 1972 Montana Constitution is discussed in the context of zoning and the Natural Areas Act.

Prior to the 1972 Montana Constitution, counties could exercise only the powers expressly granted to them by the State. The local government section of the 1972 Montana Constitution[37] expanded and liberalized the powers of city, town, and county governments. The Constitutional Convention's intent was to expand the powers of local governments by granting counties general legislative and ministerial powers, including powers relevant to zoning.

The article also discusses problems that arise under the Natural Areas Act. Although school trust lands are eligible for natural area designation, strict guidelines are placed on the disposition of these lands. The Montana Constitution states "The public school fund shall forever remain inviolate, guarantee by the state against loss or diversion."[38] According to the opinion of the Attorney General, designating school trust lands as natural areas without monetary compensation violates the Enabling Act and the Montana Constitution. The author, however, argues that the precedent relied on by the Attorney General is distinct from the situation in Montana. Furthermore, for the Natural Areas Act to be effective, designation of trust lands without monetary compensation is necessary.

Recent Developments in Montana Natural Resources Law[39]—
Stephen D. Roberts & Albert W. Stone

Article IX of the Montana Constitution[40] imposes on the Legislature a duty to enforce the goals enumerated therein. These goals fall within four sections: protecting and improving the environment, reclaiming mining lands, recording and administering water rights, and preserving and enhancing cultural resources. This article surveys major pieces of environmental and natural resource legislation passed in Montana since 1972.

The article mostly summarizes the developments, but at times discusses problems with the new legislation. For instance, the Hard Rock Rec-

36. James H. Goetz, *Recent Developments in Montana Land Use Law*, 38 Mont. L. Rev. 97 (1977).

37. Mont. Const. art. XI.

38. *Id.* at art. X, § 3.

39. Stephen D. Roberts, Student Author, & Albert W. Stone, *Recent Developments in Montana Natural Resources Law*, 38 Mont. L. Rev. 169 (1977).

40. Mont. Const. art. IX.

lamation Act and the Open Cut Mining Act were both designed to ensure proper reclamation though a system of permitting, bonding, and regulatory review. Both Acts sought to benefit the "small miner" by excusing lands with small mining operations from the process. However, the Constitution requires that "all lands disturbed by the taking of natural resources shall be reclaimed."[41] While the Legislature responded thoughtfully and comprehensively to Article IX, more work needs to be done to make natural resource laws more effective.

The Montana Constitution: Taking New Rights Seriously—General Introduction[42]

This general introduction discusses the trend in state constitutional revision to add new fundamental rights. It raises the question of whether or not state appellate courts will give new guarantees the appropriate treatment that their constitutional status implies. The introduction suggests that state courts so often defer to the federal judiciary to develop fundamental rights that they neglect their own constitutional provisions. Courts are obligated to assign constitutional guarantees sufficient weight to resist policy arguments. In order to "take rights seriously" the courts must consider the weight and scope of new constitutional guarantees.

The Montana Constitution: Taking New Rights Seriously—Environmental Rights[43]—Daniel Kemmis

This article examines several issues likely to be litigated over the environmental provisions in the Montana Constitution, including standing, whether the provisions are self-executing, and the standard to be applied under the provisions. The article addresses these issues by examining *Montana Wilderness Assn. v. Board of Health & Environmental Sciences (Beaver Creek I)*,[44] a withdrawn opinion that still exists in the form of a dissent.

The Montana Constitution does not explicitly grant environmental standing to all citizens, but the redefinition of "injury" may provide redress. The Constitution recognizes "the right to a clean and healthful environment."[45] Infringement of that right may be a legal injury, which any citizen could assert. Although questions arise as to whether Article XI is self-exe-

41. *Id.* at art. IX, § 2(1).

42. *The Montana Constitution: Taking New Rights Seriously — General Introduction*, 39 Mont. L. Rev. 221 (1978).

43. Daniel Kemmis, *The Montana Constitution: Taking New Rights Seriously—Environmental Rights*, 39 Mont. L. Rev. 224 (1978).

44. *Mont. Wilderness Assn. v. Bd. of Health & Env. Sci.*, 559 P.2d 1157 (Mont. 1976).

45. Mont. Const. art. IX, § 1(3).

cuting due to the addition of the legislative duty, the "clean and healthful" language provides a basis for judicial review. The language operates as a limitation upon governmental activity and places no affirmative duty on the Legislature. These characteristics support the conclusion that the provision is self-executing.

It is important that the Montana Supreme Court responds to the constitutional status of new environmental rights by giving them the weight appropriate for a "fundamental" right. The Court should look to *Beaver Creek I* for guidance in interpreting issues of standing, standards of review, and self-execution.

The Montana Constitution: Taking New Rights Seriously—Equal Rights[46]—Jeanne Koester

This comment discusses the standard of review that courts should apply in sex discrimination cases under the Montana Constitution's equal rights provision.[47] The author criticizes the Montana Supreme Court's 1976 decision to employ rational basis review in *State v. Craig*,[48] arguing that minimal scrutiny fails to take the prohibition against sex discrimination seriously.

The author urges the Court to adopt a standard of review recommended by the Yale Law Review for cases under the proposed Equal Rights Amendment. Under the so-called equal protection standard, the prohibition against discrimination is absolute, with just two exceptions: the equal rights provision would not override other constitutional rights, and dissimilar treatment would be allowed if based on physical characteristics unique to one sex.

The Montana Constitution: Taking New Rights Seriously—Rights in Collision: The Individual Right of Privacy and the Public Right to Know[49]—David Gorman

This comment explores the potential conflict between the public's right to know and an individual's right to privacy under the Montana Constitution. The Constitutional Convention placed a high value on the right to privacy, providing in the text of the Constitution, that the right to privacy

46. Jeanne M. Koester, Student Author, *The Montana Constitution: Taking New Rights Seriously—Equal Rights*, 39 Mont. L. Rev. 238 (1978).

47. Mont. Const. art. II, § 4.

48. *State v. Craig*, 545 P.2d 649 (1976).

49. David Gorman, Student Author, *The Montana Constitution: Taking New Rights Seriously—Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 Mont. L. Rev. 249 (1978).

"shall not be infringed without the showing of a compelling state interest."[50] The Convention also valued the public's right to know, allowing an exception only "where the demand of individual privacy clearly exceeds the merits of public disclosure."[51]

By 1978, Montana courts had not yet considered the scope of these rights or the proper inquiry should the rights conflict. The author proposes that the Montana Supreme Court undertake a three-part inquiry to weigh these rights when they conflict. First, he argues the Court should adopt the test from *Katz v. U.S.*[52] that states a privacy right exists when there is a subjective expectation of privacy that society recognizes as objectively reasonable. Second, the Court should determine whether the public's right to know in the case at hand constitutes a compelling state interest. Finally, the Court should determine whether the compelling interest is clearly exceeded by the privacy interests at stake.

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use Act[53]—
Michael F. Lamb

This comment discusses the need to quantify Indian reserved water rights in Montana so that other water rights may be adjudicated in accordance with the 1979 amendments to Montana's Water Use Act.[54] The author predicts that the Montana Constitution will not prevent the State from adjudicating Indian water rights. Article I disclaims state jurisdiction over Indian lands except as otherwise provided by the "consent of the United States and the people of Montana."[55] The author argues that the United States consented to state adjudication of Indian reserved water rights in the McCarran Amendment and the people of Montana consented by passing the 1979 amendments to the Water Use Act.

50. Mont. Const. art. II, § 10.

51. *Id.* at art. II, § 9.

52. *Katz v. U.S.*, 389 U.S. 347, 361 (1967).

53. Micheal F. Lamb, Student Author, *Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use*, 41 Mont. L. Rev. 73 (1980).

54. Mont. Code Ann. §§ 3-7-101 to 3-7-502, 85-2-211 to 85-2-243, 85-2-701 to 85-2-704, 2-15-212 (1979).

55. Mont. Const. art. I.

Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority[56]—Carl W. Tobias & Daniel N. McLean

This article critically analyzes the decisions of the Montana Supreme Court and state agencies to interpret the National Environmental Policy Act[57] (NEPA) and Montana Environmental Policy Act[58] (MEPA) narrowly. Unlike other jurisdictions in 1980, Montana took the position that agencies are not permitted to consider in their decision-making any environmental factors not expressly provided for in the legislation. The authors argue this interpretation is incorrect; the legislation encompassed a broader policy. Furthermore, they argue two provisions of the Montana Constitution[59] buttress the general mandate of NEPA and MEPA that agencies should consider the ecological impacts of their decisions.

The authors conclude that both the Constitution's environmental provisions should be considered self-executing and, even separate from MEPA, impose an obligation on government officials to consider the environmental impacts of their decisions. The authors urge the Montana Supreme Court to reconsider its narrow interpretation of MEPA in light of legislative intent, the jurisprudence of other jurisdictions, and the environmental obligations laid out in the Montana Constitution.

Intrusion, Exclusion, and Confusion: State v. Helfrich*: The Exclusionary Rule and Acts of Private Persons*[60]—Richard A. Reep

This note discusses the decision of the Montana Supreme Court in *State v. Helfrich*[61] to apply the exclusionary rule to evidence obtained from an illegal search and seizure by a private person. The author argues that the Montana Supreme Court should only apply the exclusionary rule to cases involving invasions of privacy by state actors. He argues that the history of the exclusionary rule, modern jurisprudence on the right to privacy, and the limited deterrent effect of the exclusionary rule on private persons do not support Montana's unique application of the rule to illegal searches by private persons.

---

56. Carl W. Tobias & Daniel N. McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority*, 41 Mont. L. Rev. 177 (1980).

57. 42 U.S.C. §§ 4321–4370 (1977).

58. Mont. Code Ann. §§ 75–1–101 to 75–1–324 (1979).

59. Mont. Const. art. II, § 3, art. IX, § 1(1).

60. Richard A. Reep, *Intrusion, Exclusion, and Confusion:* State v. Helfrich*: The Exclusionary Rule and Acts of Private Persons*, 41 Mont. L. Rev. 281 (1980).

61. *State v. Helfrich*, 600 P.2d 816 (1979).

Montana Green River Ordinance[62]—Dennis Paxinos

This article analyzes *Tipco Corp., Inc. v. City of Billings*,[63] which holds that Montana communities may not exempt local business from prohibitions on door-to-door sales.

Green River ordinances prohibit door-to-door peddling by merchants who have not received permission to enter from the property owners or occupants. Billings' Green River ordinance was typical in most respects, but contained a noteworthy exception: merchants located within a 150 mile radius of Billings were not subject to its provisions.

Tipco, which was located outside the radius, challenged the Billings ordinance on the ground that it violated equal protection. The Montana Supreme Court agreed, determining that the law was unconstitutional under both the Montana and U.S. Constitutions. Under *Tipco*, Montana Green River ordinances cannot contain exceptions for locally-situated businesses; all door-to-door sales must be banned in order for the ordinance to survive an equal protection challenge.

The author criticizes the decision, pointing out that the Montana Supreme Court declared it was applying only rational basis review; however, the Court looked only to Billings' stated reasons for its ordinance. Under rational basis review, courts speculate on plausible reasons for a law. An ordinance similar to the one at issue in *Tipco* was upheld against an equal protection challenge by the New York Court of Appeals.[64]

Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds[65]—Larry M. Elison & Dennis NettikSimmons

This article traces the evolution of the doctrine of independent and adequate state grounds. A state court must fulfill two requirements in order for the doctrine to apply. First, the court must clearly indicate that it is relying on independent state grounds for its opinion. Second, those grounds must be sufficient to control the issues at bar.

The authors analyze two Montana cases that show the doctrine's application. In *State v. Jackson*,[66] the Montana Supreme Court relied on a mixed

62. Denis Paxinos, Student Author, *Montana Green River Ordinances*, 44 Mont. L. Rev. 297 (1983).

63. *Tipco Corp., Inc. v. City of Billings*, 642 P.2d 1074 (Mont. 1982).

64. *People v. Bohnke*, 38 N.E.2d 478, 479 (N.Y. 1951).

65. Larry M. Elison & Dennis NettikSimmons, Student Author, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 Mont. L. Rev. 177 (1984).

66. *State v. Jackson*, 637 P.2d 1 (Mont. 1981).

analysis of federal and state constitutional law in determining that a Montana statute allowing a defendant's refusal to take a breathalyzer test into evidence violated both the Montana and U.S. Constitutions. The Montana Court's interpretation of the State's Constitution was not clearly independent of its federal constitutional interpretation. Since the Montana Court's decision had ambiguously relied on independent and adequate state grounds, the United States Supreme Court vacated and remanded the decision after it decided in another case that a defendant's refusal to take a breathalyzer test was admissible into evidence and did not violate the federal Constitution.

In *Jackson II*, the Montana Supreme Court determined that it had based its interpretation of the Montana Constitution on its interpretation of the U.S. Constitution, overruled its previous holding, and allowed the defendant's refusal to take a breathalyzer test into evidence.

Fair Trial and Free Press: The Courtroom Door Swings Open[67]—
Steve Carey

This article analyzes the procedure that Montana federal and state courts must undertake before closing criminal trial proceedings to the public.

The Montana Supreme Court has relied on the Montana Constitution's right to know provision[68] to protect public access to state-level judicial proceedings. The Montana Supreme Court has held that the right to know provision imposes "a stricter standard [than its federal counterpart] in order to authorize closure."[69]

Closure of proceedings in Montana is controlled by *State ex. rel. Smith v. District Court of Eight Judicial District, Cascade County*, which adopted Standard 8-3.2 of the American Bar Association Standards for Criminal Justice. This standard dictates that Montana courts must first consider workable alternatives to closure, such as agreements with the media not to publicize excessively prejudicial information.[70] Montana courts may order closure only when leaving proceedings open "would create a clear and present danger to the fairness of defendant's trial."[71] Meeting this threshold presents attorneys with a high burden.

67. Steve Carey, Student Author, *Fair Trial and Free Press: The Courtroom Door Swings Open*, 45 Mont. L. Rev. 323 (1984).

68. Mont. Const. art. II, § 9.

69. *Great Falls Tribune v. Dist. Ct.*, 608 P.2d 116, 120 (Mont. 1980), *overruled, St. ex rel Smith v. Dist. Ct. of 8th Jud. Dist. Cascade Co.*, 654 P.2d 982, 987 (Mont. 1982).

70. *Smith*, 654 P.2d at 987.

71. *Id.*

Towards a Theory of State Constitutional Jurisprudence[72]— Dennis NettikSimmons

This article discusses the relationship between state versus federal constitutional interpretation.

Rules of Construction from the federal context are useful in interpreting state constitutions, but there are key differences between state constitutions and their federal counterpart. For example, in states which elect judges, state courts may be more sensitive to the democratic process. Additionally, many justiciability concerns that federal courts invoke when refusing to hear cases are not present at the state level; some states even allow their supreme courts to issue advisory opinions. Finally, attorneys should be aware that many states have extensively amended their constitutions within the past decade. Unlike the various state constitutions, the U.S. Constitution has proven exceedingly difficult to amend.

The article contains extensive philosophical analysis on the role of judicial review and its impact on state constitutional jurisprudence.

Right of Privacy[73]—Larry M. Elison & Dennis NettikSimmons

This article explores the development of the right of privacy in both the federal and Montana systems. The right is rooted in the common law's reverence for individual property rights. The authors devote much of the article to tracing the privacy right's evolution in the federal court system.

The 1972 Montana Constitution is one of only a few state constitutions that contain an express right of privacy.[74] In *State v. Long*, the Montana Supreme Court held that this guarantee does not protect individuals from the acts of other private persons; rather, it only provides protection from state actors.[75] The authors marshal impressive evidence in support of their argument that *Long* was wrongly decided. For example, transcripts of the 1972 Montana Constitutional Convention indicate that the delegates were greatly concerned about invasions of individual privacy by private third parties unaffiliated with the State.

Montana's Constitution also contains a "right to know" provision.[76] The authors believe that the right to know provision buttresses the right to

72. Dennis NettikSimmons, Student Author, *Towards a Theory of State Constitutional Jurisprudence*, 46 Mont. L. Rev. 261 (1985).

73. Larry M. Elison & Dennis NettikSimmons, Student Author, *Right of Privacy*, 48 Mont. L. Rev. 1 (1985).

74. Mont. Const. art. I, § 9.

75. *State v. Long*, 700 P.2d 153, 156 (Mont. 1985).

76. Mont. Const. art. II, § 9.

privacy by allowing individuals some degree of control over the use and distribution of their personal information that is held by the State.

Constitutional Initiative 30: What Constitutional Rights did Montanans Surrender in Hopes of Securing Liability Insurance?[77]— Bari R. Burke

A byproduct of the insurance industry's push for tort reform, Constitutional Initiative 30 allows the Legislature to limit or abolish common-law remedies. The author contends that the debate over Initiative 30 lacked depth, and failed to inform the public of the significant ramifications of its passage. In their haste for tort reform, Montanans abrogated their previously certain right to legal redress for compensable personal injuries.

Early jurisprudence on Article II, § 16 of the Montana Constitution held that the Legislature was free to abolish common law causes of action.[78] Later on (before the development of Initiative 30) the Montana Supreme Court held that Article II, § 16 of the Montana Constitution mandated that the Legislature provide substitute remedies when modifying the common law.[79] Initiative 30 essentially restores the former interpretation.

Much of the article is devoted to an in-depth historical analysis of the various cases arising under Article II, § 16 of the current Montana Constitution and its predecessor, Article III, § 6 of the 1889 Montana Constitution.

Butte Community Union v. Lewis: A New Constitutional Standard for Evaluating General Assistance Legislation[80]—Scott C. Wurster

This article discusses the Montana Supreme Court's constitutional analysis of general assistance requirements enacted by the Legislature in 1985. When age restrictions were placed on eligibility for welfare, a group of recipients filed suit alleging violations of equal protection[81] and of the Montana Constitution's guarantee of "economic assistance" for the aged, infirm, or misfortunate.[82] While the Court discerned no fundamental right to welfare, it did find that the legislation violated equal protection and was thus unconstitutional.[83] In this decision, the Court applied a middle-tier

77. Bari R. Burke, *Constitutional Initiative 30: What Constitutional Rights did Montanans Surrender in Hopes of Securing Liability Insurance?*, 48 Mont. L. Rev 53 (1987).

78. *Reeves v. Ille Electric Co.*, 551 P.2d 647, 651 (Mont. 1976).

79. *Corrigan v. Janney*, 626 P.2d 838, 840 (Mont. 1981), *overruled, Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 491 (Mont. 1989).

80. Scott C. Wurster, Butte Community Union v. Lewis: *A New Constitutional Standard for Evaluating General Assistance*, 48 Mont. L. Rev. 163 (1987).

81. Mont. Const. art. II, § 4.

82. *Id.* at art. XII, § 3(3).

83. *Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986).

standard of review for the first time. The Court reasoned that because economic assistance was specifically mentioned in the Montana Constitution, any restrictions on welfare warranted a heightened standard of analysis.

The Montana Legislature then amended the general assistance bill by deleting any reference to age and, instead, implemented restrictions based on income. The Court upheld this legislation, finding the classification reasonable and that the State's interest in saving money outweighed the interest in obtaining benefits for those with a greater income.[84]

This article concludes by reconciling these two decisions and attempting to refine how the Court will, and should, apply this middle-tier standard in the future.

The Montana Supreme Court in Politics[85]—James J. Lopach

This article discusses the Montana Supreme Court's interpretation of the Montana Constitution regarding tort reform in 1983 and welfare reform in 1986. In addressing tort reform, the Court focused on the constitutional guarantee of a "remedy afforded for every injury of person, property, or character."[86] In doing so, the Court found that exceptions to state and local tort immunity created by the Legislature were unconstitutional.[87]

The Expectancy of Parole in Montana: A Right Entitled to Some Due Process[88]—Linda M. Trueb

This article discusses the due process protections afforded to inmates after the United States Supreme Court held there is a right to expect parole if statutory language creates a presumption of release.[89] Some due process attaches to this right in Montana because state law mandates parole after a prisoner has satisfied certain eligibility requirements.[90] Montana has met the minimum standard for parole rights as set forth by the Supreme Court because it provides inmates with prior notice, a hearing, and notification of the Parole Board's decision. Affording Montana prisoners greater procedural protections, however, would increase confidence and fairness in the judicial system. Because parole has previously been denied based on errors in a prisoner's file, inmates should additionally receive a summary of the

84. *Deaconess Med. Ctr. v. Dept. of Soc. & Rehabilitation Servs.*, 220 Mont 127, 132 (1986).

85. James J. Lopach, *The Montana Supreme Court in Politics*, 48 Mont. L. Rev. 267 (1987).

86. Mont. Const. art. II, § 16.

87. *White v. State*, 203 Mont. 363, 367–370 (1983).

88. Linda M. Trueb, *The Expectancy of Parole in Montana: A Right Entitled to Some Due Process*, 48 Mont. L. Rev. 379 (1987).

89. *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 7 (1979).

90. Mont. Code Ann. § 46–23–201.

evidence against them prior to their hearing so that they may rebut such evidence.

Concerning welfare reform, the Court relied on the constitutional provision stating the "legislature shall provide" economic assistance for those in need.[91] There, the Court found the Legislature's newly-imposed age restrictions for welfare eligibility violated equal protection.[92]

This article argues that both decisions were reached erroneously as a result of the Court's failure to: (1) review the unambiguous intentions of the delegates to the 1972 Montana Constitutional Convention; (2) adhere to prior case law; (3) respect the Legislature as the lawmaking body; and (4) honor Montana's value of popular governance.

Toward Dignity in the Workplace: Miller–Wohl *and Beyond*[93]—
Wendy A. Fitzgerald

This article discusses sex discrimination regarding a woman's leave from employment in the federal system as opposed to that articulated in the Montana Constitution. Although federal courts employ an equal treatment analysis under Title VII, such an approach is flawed because it fails to account for all forms of discrimination a woman faces in the workplace. Moreover, the federal analysis affords women protection from discrimination, but only insofar as they are willing and capable of performing in the workplace to the extent men always have. Conversely, the Montana Constitution states that "dignity of the human being is inviolable."[94] This language necessitates a more searching inquiry because, in the case of an employee who is a mother, courts scrutinize her collective experience in the community above her experience in the workplace.

Although the language of the Montana Constitution offers a greater opportunity to combat sex discrimination as a whole, the Montana Supreme Court has largely elected to follow the federal model prohibiting discrimination in employment. The onus is, thus, upon Montana attorneys to develop a new analysis reflecting equality and dignity in sex discrimination cases. The Montana Legislature should also continue to develop programs targeting discrimination and recognizing the inherent worth of every individual.

91. Mont. Const. art. XII, § 3(3).

92. *Butte Community Union*, 712 P.2d 1309 (Mont. 1986).

93. Wendy A. Fitzerald, *Toward Dignity in the Workplace:* Miller-Wohl *and Beyond*, 49 Mont. L. Rev. 147 (1988).

94. Mont. Const. art. II, § 4.

Keynote Speech to the Law School Symposium on the 1972 Constitution[95]—Stan Stephens

In this article, former Governor Stan Stephens expressed his views on Montana's 1972 Constitution 18 years after its ratification. He first notes the peculiarity in which the new Constitution was adopted: 44 of Montana's 56 counties rejected the document, yet it was approved by a margin of 2,532 votes. Stephens briefly discussed some problems with the 1972 Constitution in the form of broadened judicial powers and ambiguous legislative duties. He then explained its favorable attributes including the line-item and amendatory veto power which give the legislative and executive powers more flexibility. Stephens concluded by stating that although the new Constitution specifically contemplates additional conventions in the future,[96] such a measure was not warranted as the present document serves the people well.

The 1972 Montana Constitution in Historical Context[97]—Richard Roeder

This article provides a brief history of the Montana Constitution from the 1889 Convention to the events triggering the 1972 Convention. The drafters of the original Constitution, fearing corruption from politicians, wrote a lengthy document full of details designed to protect the new State. In addition, the 1889 drafters mandated the Legislature meet only for short biennial terms in which the members were confined by detailed restrictions on taxation. Similarly, the executive branch was to be divided among seven major elective officers who would presumably check and balance each other.

Problems with the 1889 Constitution arose quickly and persisted until 1972. As time passed and technology grew, demands on the Legislature increased. Favorable legislation was often passed, but the result was an expanding bureaucracy; by 1920, there were over one hundred executive branch officers, commissions, and boards.

Although the Legislature attempted to remedy these problems, the specificity of the original draft prompted response to details rather than design. In 1965, the bills for amendments to the Constitution rose to as high as 32, yet the limit of three amendments on the general election ballot stifled any meaningful progress. Shortcomings in the court system also produced a strain on the judicial branch; only two court amendments were

95. Stan Stephens, *Keynote Speech to the Law School Symposium on the 1972 Constitution*, 51 Mont. L. Rev. 237 (1990).

96. Mont. Const. art. XIV, § 3.

97. Richard Roeder, *The 1972 Montana Constitution in Historical Context*, 51 Mont. L. Rev. 260 (1990).

approved before the 1972 Constitution. Consequently, many problems lingered concerning elections, the inferior court system, and judicial resources.

By the late 1960s these insurmountable obstacles combined with demanding economic conditions to form a catalyst for wholesale constitutional reform.

The 1972 Montana Constitution in a Contemporary Context[98]— Harry W. Fritz

This article offers a brief description of the events from the 1960s to the ratification of the 1972 Montana Constitution. A major force in the transition was a federal mandate from the U.S. Supreme Court for legislative reapportionment. The 1889 constitutional system was designed for a rural polity and thus allowed one representative from each of the 56 counties. When urban senators and representatives were added based on data from the 1960 census, constitutional reform was imminent. Once the Legislature put a proposition for a Constitutional Convention to the voters in 1970, it passed with a sixty-five percent majority.

The selection of 100 convention delegates in 1971 was also notable. A simultaneous vote on a sales tax was rejected by a seventy percent margin. The tax effort backfired on the republicans who sponsored the bill when 58 democrats and six independents were elected for the Constitutional Convention.

A prospering economy also influenced the constitutional reform. The late 1960s and early 1970s marked high returns in logging, mining, and farming, all of which encouraged change to perpetuate the lucrative businesses.

An environmental movement was also triggered when a North Central Power study of 1971 predicted coal-fired electrical generating plants and the possible diversion of half of the Yellowstone River. This finding, coupled with voter response, led the Convention to adopt a provision ensuring "a clean and healthful environment."[99]

98. Harry W. Fritz, *The 1972 Montana Constitution in a Contemporary Context*, 51 Mont. L. Rev. 270 (1990).

99. Mont. Const. art. II, § 3.

Implementation and Amendment of the 1972 Constitution[100]— Diana S. Dowling

This article discusses the ongoing process of implementing the 1972 Montana Constitution. The 1973 Legislature passed the most significant legislation involving the new Constitution, including some 60 bills. The task of writing and enacting the legislation necessary to complete the Constitution fell to legislative staff members, who studied areas in which the new Constitution conflicted with old statutory law.

While implementing the 1972 Constitution, both the convention delegates and the legislators who passed amendments to the Constitution tapped into their own beliefs and values, what the author calls "programming." Programming changes from generation to generation; thus, the Montana Constitution will change over time as the beliefs of society change.

Programming occurred in relevant constitutional areas such as individual liberties, revenue and finance, the environment, and the judiciary. For example, the 1974 Montana Commission on Human Rights was developed by an act preventing discrimination in employment, public accommodations, education, and real property transactions. Additionally, many environmental acts were passed after the 1972 Constitution, including the Comprehensive Environmental Cleanup and Responsibility Act.

As the values and beliefs of Montanans continue to change over time, so will legislation implementing the 1972 Montana Constitution. While there is no guarantee that the will of the majority will be well reasoned when applied to Montana law, legislators' differences in opinion will balance one another to aid a common good.

Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic[101]—James H. Goetz

This article explores the unique characteristics of the 1972 Montana Constitution. First, the article discusses the proper role of state constitutions in the federal system. Next, the article approaches the Montana Constitution by examining two categories: the protection of individual rights, found mostly in Article II of the Montana Constitution, and the structure and orderly functioning of the government, found in the remaining articles.

The Montana Constitution protects individual rights which have no counterpart in the U.S. Constitution. Additionally, the Montana Constitu-

100. Diana S. Dowling, *Implementation and Amendment of the 1972 Constitution*, 51 Mont. L. Rev. 282 (1990).

101. James H. Goetz, *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*, 51 Mont. L. Rev. 289 (1990).

tion includes some guarantees that, although similar to guarantees in the U.S. Constitution, are interpreted independently by the Montana Supreme Court. Montana has elevated the right of individual privacy compared to other constitutional rights.[102] Additionally, the right to observe governmental deliberations has a higher value in Montana than in the federal system.[103] Because the Montana Supreme Court places such a high value on both the right to privacy and the right to know, it has struggled to reconcile the conflicting provisions. Despite this, the Montana Constitution's declaration of rights is known as one of the most stringent protectors of individual liberties.

The structure of the Montana Constitution is unique in various respects. Its provisions regarding the environment and natural resources are particularly distinctive. For example, it states that all people have the right to "a clean and healthful environment."[104] Like its protections of individual liberties, the structure of the Montana Constitution is also one of the most progressive in the country.

Public Purpose and Economic Development: The Montana Perspective[105]—Mae Nan Ellingson & Jerry C.D. Mahoney

This article reviews Montana Supreme Court decisions applying the 1972 Montana Constitution's Public Purpose Clause in an attempt to draw conclusions about permissible economic development activities for local governments. The Clause provides that "taxes shall be levied by general laws for public purposes."[106] This provision is often equated with the Montana Constitution's Appropriation Clause.[107]

The Montana Supreme Court issued conflicting opinions suggesting what is and is not an economic program for a valid public purpose. For example, in *White v. State*[108] and *Hollow v.* State,[109] the Court suggested that economic programs at issue were not for a public purpose under the Public Purpose Clause of the Montana Constitution, although they were markedly similar to an economic program that was upheld as a valid public purpose in *Fickes v. Missoula County.*[110] In order for Montana to improve its business climate, the authors suggest that the Montana Supreme Court

102. Mont. Const. art. II, § 10.

103. *Id.* at art. II, § 9.

104. *Id.* at art. II, § 3.

105. Mae Nan Ellingson & Jerry C.D. Mahoney, *Public Purpose and Economic Development: The Montana Perspective*, 51 Mont. L. Rev. 356 (1990).

106. Mont. Const. art. VIII, § 1.

107. *Id.* at art. V, § 11(5).

108. *White v. State*, 759 P.2d 971 (Mont. 1988).

109. *Hollow v. State*, 723 P.2d 227 (Mont. 1986).

110. *Fickes v. Missoula Co.*, 470 P.2d 287 (Mont. 1970).

either fully articulate its concept of public purposes or retreat from the standards set forth in *Hollow* and *White*.

Montana's Constitutionally Established Investment Program: A State Investing Against Itself[111]—Wendy A. Fitzgerald

This article explores how Montana's Constitutional provision on state investment[112] has not been implemented as envisioned by the delegates who created it in 1972. The delegates' goals for the investment program were public accountability, instate investment, and prevention of state conflicts of interest. The author looks at how progressive, populist, and conservative influences shaped the article on state investment. Progressives wanted state investment funds unified to give more control to the people, while populists preferred state monies be invested in state enterprises, and conservatives sought to prevent conflicts of interest arising out of state investment in and regulation of Montana corporations.

The manner in which the Legislature has implemented the investment program has failed to realize the delegates' goals. The Legislature adopted a "prudent expert" standard by which the Board of Investments, a board of financial experts the Legislature created to invest state funds, must abide. Under this standard, there is no public accountability because the Board is solely governed by the prudent expert standard; there is very little in-state investment because greater returns can be found out of state; and conflicts of interest have not been eliminated because the State can invest retirement funds, which constitute a large portion of state investment funds, in corporate common stock. For example, Montana is invested in companies operating in the South African apartheid system. This is contrary to Montana's constitutional provision on equal rights; yet, the Board of Investments successfully argued the prudent expert standard precluded divestment from South Africa. The author concludes that Montanans must demand the State significantly alter its investment policies if the delegates' vision for state investment is to be realized.

Revenue and Finance under Montana's 1972 Constitution[113]—Thomas E. Towe

This article discusses the changes made at the 1972 Constitutional Convention to the revenue and finance portion of the Montana Constitution.

111. Wendy A. Fitzgerald, *Montana's Constitutionally Established Investment Program: A State Investing Against Itself*, 51 Mont. L. Rev. 378 (1990).

112. Mont. Const. art. VIII, § 13.

113. Thomas E. Towe, *Revenue and Finance under Montana's 1972 Constitution*, 51 Mont. L. Rev. 399 (1990).

The most significant change to the revenue and finance article[114] was the equalization of property tax values to ensure an equal system of taxation throughout Montana. Previously, counties were using only a fraction of property values for taxation purposes, and this fraction varied among counties.

In addition, the Legislature was given the mandate to create a unified investment program for public funds. Investment return, not being a main consideration under the 1889 Constitution, became the primary factor by which professional investors would determine how to invest state funds.

The limitations on state indebtedness were changed to allow a bond issue to be approved by either a two-thirds vote of each house of the legislature, or by popular vote. The limitations on local debt were also changed, but instead of proscribing rules and limitations, it was left to the Legislature to address.

There were a number of changes made regarding tax-exempt property. Most significantly, the Legislature was authorized to exempt any property it wanted from taxation. The author concludes that because of its simplicity and farsightedness, the revenue and finance article will serve Montanans well into the future.

The Montana Constitution and the Right to a Clean and Healthful Environment[115]—Deborah Beaumont Schmidt & Robert J. Thompson

This article describes how competing private and public values have shaped the implementation of the Montana Constitution's guarantee to a "clean and healthful environment."[116] Much of the debate at the 1972 Constitutional Convention focused on the clash between environmental protection and private property rights—a controversy that continues today.

The author lists four areas of environmental policy impacted by these competing values. Legislation affecting Montana's water resources has attempted to strike an acceptable balance between the interests of conservationists and landowners, primarily because Montanans want protection from downstream threats. Similarly, Montana's mining laws are a fair balance between those wanting to keep mining a central part of the economy and those wanting to protect both public and private land from the abuses of mining.

114. Mont. Const. art. VIII.

115. Deborah Beaumont Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 Mont. L. Rev. 411 (1990).

116. Mont. Const. art. II, § 3.

However, Montana's land use laws fail to strike an adequate balance between public and private interests. Montanans are quick to regulate large corporations; however, they are reluctant to regulate themselves. Small scale mineral extraction and subdivisions are examples of where regulation is lacking. The cumulative effects of this lack of regulation will be significant. Non-point source pollution and the destruction of environmentally sensitive areas will become a main source of pollution unless individuals become better stewards of the land.

The regulation of individual action will become increasingly more important as large scale polluters become subject to stringent regulations and the cumulative effects of individual action become a main source of environmental degradation.

The Battle for the Environmental Provisions in Montana's 1972 Constitution[117]—C. Louise Cross

This article is based on a speech given by the author recalling her efforts at the 1972 Montana Constitutional Convention to obtain stronger environmental protections in Montana's Constitution. The author was the chairperson of the committee on natural resources and agriculture. Cross's perseverance was critical in passing progressive environmental provisions.

At the Convention, the debate focused on two provisions: a public trust provision and a citizens' right to sue provision. The debate over these provisions was intense, with opponents labeling them takings of private property. A member of Cross's committee went so far as to label the provisions socialist, effectively killing them.

However, all was not lost. Cross was successful in getting a provision passed that ensured land disturbed by mining activities would be reclaimed. In addition, the right to a clean and healthful environment was included in both the Bill of Rights and the natural resources article.

After the convention, another delegate told Cross that she should not be disappointed in what she had accomplished at the Convention; there were significant environmental protections added to the Constitution. Looking back, she realized he was right.

The Judicial Article: What Went Wrong?[118]—Jean M. Bowman

This article criticizes the Montana Constitution's judicial article.[119] The Judicial Article created at the 1972 Constitutional Convention does not

117. C. Louise Cross, *The Battle for the Environmental Provisions in Montana's 1972 Constitution*, 51 Mont. L. Rev. 449 (1990).

118. Jean M. Bowman, *The Judicial Article: What Went Wrong*, 51 Mont. L. Rev. 492 (1990).

119. Mont. Const. art. VII.

vary significantly from the article in Montana's 1889 Constitution because the delegates did not understand how to create an effective judiciary.

The section of the Judicial Article proscribing selection of judges is problematic because it combines pure election with merit selection of judges—a departure from the 1889 Constitution. The Governor makes an appointment to fill a judicial vacancy, subject to senate confirmation, and in the next election the voters determine whether to accept or reject the appointment. If the incumbent judge runs unopposed, he is subject to a yes or no vote on whether he should be retained. Unfortunately, this election/selection method has done little to preserve the electorate's voice in the process since judges often run unopposed, and when there is another candidate, incumbents typically win by large margins.

The section on removal and discipline grants authority to the Judicial Standards Commission to censure members of the bar, and originally required that such proceedings be absolutely confidential. However, these provisions have been weakened since their initial passage in 1972. Montana voters passed two subsequent amendments limiting the absolute confidentiality requirement, and the Montana Supreme Court has placed some limitations on the Commission's power.

The delegates to the 1972 Constitutional Convention created a judiciary comprised of semi-independent bodies, which has resulted in a terribly inefficient judicial system that is in desperate need of change.

Classroom v. Courtroom: Is the Right to Education Fundamental?[120]— Lori Anne Harper

This article criticizes the Montana Supreme Court's decision in *State ex. Rel. Bartness v. Board of Trustees*[121] for failing to explicitly state the right to education is fundamental and for failing to recognize extracurricular activities as a fundamental component of education. The Court recognized various components of education could be deemed fundamental; however, it failed to delineate which components are fundamental. It did, however, conclude that extracurricular activities are not a fundamental component of education.

The author's disagreement with this decision is based on information contained in the transcripts from the 1972 Constitutional Convention. The transcripts show the delegates recognized the overriding importance of education and intended to create an educational provision[122] that expressed the

120. Lori Anne Harper, *Classroom v. Courtroom — Is the Right to Education Fundamental?*, 51 Mont. L. Rev. 509 (1990).

121. *State ex. Rel. Bartness v. Bd. of Trustees*, 726 P.2d 801 (1986).

122. Mont. Const. art. X, § 1.

value of activities both inside and outside the classroom. The delegates believed quality, equality, and flexibility are crucial to a solid education. Accordingly, the delegates intended to make the right to education fundamental.

The Court missed an opportunity to implement the delegates' intent for public education. The author concludes that the Education Clause should be clarified to clearly reflect the right to an education is in fact a fundamental right.

King's Resurrection: Sovereign Immunity Returns to Montana[123]— John A. Kutzman

This comment argues that the 1972 Constitution's abrogation of sovereign immunity[124] was eviscerated by a series of cases improperly decided by the Montana Supreme Court. Sovereign immunity—the ability of the government or governmental officials to claim immunity from civil suit—was abrogated by Article II, § 18 of the 1972 Montana Constitution. The constitutional convention delegates wanted to abolish sovereign immunity because they viewed it as unfair that citizens could not seek redress for injuries merely because the government was an adverse party.

However, in 1974 the voters amended this provision to give the Legislature the ability to make exceptions to the constitutional abrogation of sovereign immunity by a two-thirds vote of each house. Following this amendment, in 1977 the Legislature enacted reforms of Article II, § 18 that included damage caps and immunity statutes. Additionally, the Legislature in 1977 extended sovereign immunity to protect legislative acts.

Although this reform covered only legislative acts, and not administrative ones, the Montana Supreme Court erred by shielding administrative acts from suit as well. For example, the Court found a school janitor's negligent failure to remove snow and ice from a stairwell was a legislative act because the school board failed to appropriate the necessary funds for the school's upkeep.[125] Because the Montana Supreme Court refused to distinguish between administrative acts and legislative acts, the Court effectively re-imposed blanket sovereign immunity and likely contravened the Montana Constitution.

123. John A. Kutzman, *King's Resurrection: Sovereign Immunity Returns to Montana*, 51 Mont. L. Rev. 529 (1990).

124. Mont. Const. art. II, §18.

125. *State ex rel. Eccleston v. Dist. Ct.*, 783 P. 2d 363 (Mont. 1989).

Untouched Protection from Discrimination: Private Action in Montana's Individual Dignity Clause[126]—Tia Rikel Robbin

This comment explores the Dignity Clause[127] of the 1972 Constitution and its attempts to end public as well as private discrimination in Montana. Going beyond the U.S. Constitution, the Montana Dignity Clause specifically provides that "neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."[128]

Before the adoption of this provision, Montanans relied on the 14th Amendment of the U.S. Constitution and anti-discrimination provisions derived from the 1889 Montana Constitution. The problem, however, was that there was no protection from state or private discrimination. Though the Montana clause was designed to provide a higher level of protection from discrimination for its citizens, its language was too broad to effectively carry out this task. However, instead of focusing on its limitations, courts should embrace the broad language of the Dignity Clause and extend its protection to as many situations as possible. Doing so would not only provide the highest level of protection for Montanans, but would also implement the express intentions of the 1972 drafters.

Privatization of the Water Resource: Salvage, Leases, and Changes[129]—Albert W. Stone

The 1972 Montana Constitution provides, "all . . . waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[130] In this comment, the author questions the validity of two substantial changes to Montana water law during the 1991 biennial legislative session: (1) the incentive to salvage water through water-saving methods and (2) allowing temporary or intermittent changes and the re-allocation of water.

The 1991 legislation went further than merely allowing changes in water rights; this new statute permitted creation of new water rights with earlier priority dates. As a result, the water would become a private commodity instead of a public resource. Furthermore, the legislation allowed

126. Tia Rikel Robbin, *Untouched Protection from Discrimination: Private Action in Montana's Individual Dignity Clause*, 51 Mont. L. Rev. 553 (1990).

127. Mont. Const. art. II, § 4.

128. *Id.*

129. Albert W. Stone, *Privatization of the Water Resource: Salvage, Leases, and Changes*, 54 Mont. L. Rev. 99 (1993).

130. Mont. Const. art. IX, § 3(3).

old appropriators to market their surplus water, meaning the water would cease to be public property. Under this system, water is treated as an economic commodity in the free market. With such a change, an important policy issue arises: whether a water right should be capable of conferring exclusive private ownership over a public resource.

Comments on Government Censorship and Secrecy[131]—Larry M. Elison & Deborah E. Elison

This comment examines the extent to which the public has a right to know and to speak out against the government's power to censor and conceal. Montana is only one of four states to have an explicit constitutional provision for the right to know. But Montana is the only state that does not limit such a right with broad exceptions that tend to infringe on this right. As a result, Montana appears to provide the public more of a constitutional right to know than any other state. However, even with such a clear position in its Constitution, several statutory provisions remain on the books that purport to limit the public's right to know. While the Montana Supreme Court has found some of these statutory restrictions to be unconstitutional, the Court has failed to consider the historical justification for a right to know and it has failed to analyze the statutes in a consistent manner. Article II, § 9 of the Montana Constitution specifically states only one exception to the public's right to know: "[C]ases in which the demand of individual privacy clearly exceeds the merits of public disclosure." To be clear, individual privacy does not extend to the government or corporations. It is only when an individual's privacy is at risk that a right to know may be restricted. However, the balance is generally tipped in favor of disclosure.

Montana Supreme Court Unnecessarily Misconstrues Takings Law[132]—John L. Horwich & Hertha L. Lund

This comment argues the Montana Supreme Court erred in *Kudloff v. City of Billings*[133] by engaging in an improper takings analysis. The Court's takings analysis oversimplified and mischaracterized takings jurisprudence under both the U.S. Constitution and the Montana Constitution.

The plaintiff, who owned 133 acres of land near the Billings airport, had originally been allowed to develop a portion of his property for a ski area. However, he was unable to obtain the necessary financing. When the

131. Larry M. Elison & Deborah E. Elison, *Comments on Government Censorship and Secrecy*, 55 Mont. L. Rev. 175 (1994).

132. John L. Horwich & Hertha L. Lund, *Montana Supreme Court Unnecessarily Misconstrues Takings Law*, 55 Mont. L. Rev. 455 (1994).

133. *Kudloff v. City of Billings*, 860 P. 2d 140 (Mont. 1993).

city of Billings annexed the plaintiff's land, he filed suit claiming the city violated state statutes and his constitutional rights.

Though the Montana Supreme Court reached the correct result in *Kudloff*, the Court improperly addressed his takings claim. The *Kudloff* Court erred by holding a compensable taking did not occur because the annexation did not deprive the plaintiff's property of all economically beneficial uses. This holding mischaracterized takings jurisprudence at both the state and federal levels by oversimplifying prior precedent and incorrectly applying it to this case. Neither federal takings jurisprudence nor Supreme Court precedent suggest a property owner must be deprived of all economically beneficial uses of his property to have a valid claim. Furthermore, unlike the U.S. Constitution, the Montana Constitution requires just compensation for either taking private property or damaging it.[134] Thus, the takings language under the Montana Constitution apparently requires compensation for a regulatory taking even though the property owner is not deprived of all economically beneficial uses of his property.

Montana's Environmental Quality Provisions: Self-Execution or Self-Delusion[135]—John L. Horwich

This article examines whether the environmental quality provisions set forth in the Montana Constitution[136] are self-executing. To be self-executing, the Constitution's environmental quality provisions must establish legally enforceable rights and obligations the judiciary could enforce without further action by the Legislature. However, in deciding whether these provisions are self-executing, a traditional self-execution analysis is inadequate because it does not address the complexities and nuances of the Montana Constitution's environmental quality provisions.

Under Article II, § 3 of the Montana Constitution, citizens possess certain inalienable rights including "the right to a clean and healthful environment." Defining terms such as "clean" and "healthful" proves difficult because these terms are vague. Applying this particular clause to a case would be equally difficult because the clause is silent as to remedies and enforcement. Additionally, it is unclear against whom the provisions are enforceable and whether they could be applied to private parties or merely the government. Article IX's environmental provisions also provide little in the way of judicially enforceable obligations.

134. Mont. Const. art. II, § 29.

135. John L. Horwich, *Montana's Environmental Quality Provisions: Self-Execution or Self-Delusion*, 57 Mont. L. Rev. 323 (1996).

136. Mont. Const. art. II, § 3; Mont. Const. art. IX, § 1.

Though Montana's environmental quality provisions do not expressly provide for judicially enforceable obligations, their presence in the Constitution should not be undervalued. The right to a clean and healthful environment indeed exists by virtue of this right's inclusion in the Constitution. Therefore, government officials as well as private citizens have an obligation to respect that right to the best of their ability. Moreover, government action may be informed and guided by the environmental rights contained in the Constitution.

Civil Practice in Montana's People's Courts: The Proposed Montana Justice and City Court Rules of Civil Procedure[137]—
Cynthia Ford

This article highlights the importance of having clear procedural rules for Montana's justice and city courts. It also gives an overview of the proposed rules that were to update the 1990 version of the Montana Justice Court Rules of Civil Procedure. Many of the parties in justice and city courts are not represented by practicing attorneys, and the outcomes of these proceedings are decided by justices of the peace, many of whom do not have a formal legal education. Providing these "people's courts" with clear procedural rules is essential given their large caseload, and because they play a pivotal role for many Montanans as courts of first and last resort.

Article VII, § 5 of the 1972 Montana Constitution carried on the tradition of maintaining the justice courts system from the 1889 Constitution. City courts as well as municipal courts were also authorized under the 1972 Constitution.[138] These courts had been heavily criticized for their poor quality during the 1960s; however, the drafters kept the constitutionally mandated justice courts and permitted the Legislature to decide whether to abolish city courts. The criticism effectively raised the importance of improving these courts. In addition to enhancing the training and education of judges, the necessity of improving the rules of procedure for these courts was recognized. In 1982, the Montana Supreme Court enacted the first version of the Montana Justice Court Rules of Civil Procedure. Over time, though, as these courts faced a significant increase in their civil case loads, it became clear the rules would need to be updated. In 1990, these rules were updated and expanded. The remainder of this article provides an overview of the rules proposed in 1997 to replace the 1990 rules.

137. Cynthia Ford, *Civil Practice in Montana's People's Courts: The Proposed Montana Justice and City Court Rules of Civil Procedure*, 58 Mont. L. Rev. 197 (1997).

138. Mont. Const. art. VII, §5.

Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents[139]—David Aronofsky

The 1972 Montana Constitutional Convention dramatically changed higher education by removing its control from the executive and legislative branches and placing its governance in the hands of the politically autonomous Board of Regents.[140] Before the creation of the Board, higher education in Montana was largely considered a failure and was marked by political meddling, a lack of academic freedom, and ineffective leadership.

Despite improvements to the system, the Board of Regents remained highly controversial. In 1996, Constitutional Amendment 30 sought to eliminate the Board of Regents and place a Department of Education within the executive branch. The Amendment was ultimately rejected by voters but efforts continued to weaken if not eliminate the Board.

This article presents a comparative analysis of Montana's governance of higher education with higher education systems across the nation and reviews arguments for and against an autonomous higher education system. It concludes that Montana voters were smart to reject Constitutional Amendment 30 and retain the autonomous Board of Regents.

Parental Notification of Abortion and Minors' Rights under the Montana Constitution[141]—Matthew B. Hayhurst

This article explores whether parental notification laws are unconstitutional in Montana. In 1995, the Montana Legislature passed the Parental Notification of Abortion Act. Dr. Susan Wickland believed the law provided an inadequate judicial bypass and challenged it under the U.S. Constitution but did not challenge it under the Montana Constitution. Wickland's case went to the U.S. Supreme Court where the law was upheld.

The result may have been different if argued under Montana's Constitution. The 1972 Montana Constitutional Convention was concerned about unequal application of rights for minors, so delegates included a provision that stated rights between adults and minors would be equal unless a law was specifically devised to enhance the protection of minors.[142]

When the Montana Supreme Court first interpreted this provision in *In Re C.H.*, it developed a four-part test to determine when a law targeting

139. David Aronofsky, *Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333 (1997).

140. Mont. Const. art. X, § 9(2)(a).

141. Matthew B. Hayhurst, student author, *Parental Notification of Abortion and Minors' Rights under the Montana Constitution*, 58 Mont. L. Rev. 565 (1997).

142. Mont. Const. art. II, § 15.

minors was valid.[143] If the four-part test was applied to the Parental Notification of Abortion Act, the Court would determine the law violates a minor's right to privacy. Furthermore, the legislative history demonstrates the Act was not intended to protect minors but to protect "the sanctity of the traditional family structure." Since the law's violation does not enhance the protection of a minor, the Court would find it unconstitutional.

Erger v. Askren: Protecting the Biological Parent's Rights at the Child's Expense[144]—Heather M. Latino

This casenote reviews the Montana Supreme Court's decision in *Erger v. Askren*.[145] In that case, a biological father sought custody of his child from a stepfather. The district court applied the "best interest of the child" test and awarded custody to the stepfather.

The Montana Supreme Court reversed, determining that the best interest of the child test inadequately considered the constitutional and parental rights of a biological father. In examining parental rights, the Supreme Court relied exclusively on U.S. Supreme Court precedent rather than interpreting the Montana Constitution.

While acknowledging the existence of parental rights, the Court failed to consider rights of the child. The Montana Constitution provides children and adults identical rights, and because minors enjoy these equalized rights, the Court should have looked to the child's rights as well.[146] By only considering the father's rights and not weighing them against the child's rights, *Erger* is a flawed opinion.

The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy[147]—Scott A. Fisk

This article discusses whether physician-assisted suicide is constitutionally protected under Montana's right to privacy.[148] In writing the Montana Constitution, the 1972 Constitutional Convention delegates included a right to privacy to create a "semi-permeable wall" between the individual and the State. The provision expresses the State's cultural tradition of personal autonomy.

143. *In Re C.H.*, 683 P.2d 931, 938–941 (Mont. 1984).

144. Heather M. Latino, student author, Erger v. Askren*: Protecting the Biological Parent's Rights at the Child's Expense*, 58 Mont. L. Rev. 599 (1997).

145. *Erger v. Askren*, 919 P.2d 388 (Mont. 1996).

146. Mont. Const. art. II, § 15.

147. Scott A. Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 Mont. L. Rev. 301 (1998).

148. Mont. Const. II, § 10.

The Montana Supreme Court has interpreted the state right to privacy to be stronger and broader than the federal privacy right recognized by the United States Supreme Court. This became clear after *Gryczan v. State*,[149] where the Montana Supreme Court found the right to privacy protects homosexual sodomy. By contrast, the United States Supreme Court found in *Bowers v. Hardwick*[150] that sodomy is not protected.

While the United States Supreme Court has not held there is not a right to die, Montana's strong right to privacy and uniquely independent culture may lead the Montana Supreme Court to find such a right.

Face to Face: The Crime Lab Exceptions of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause[151]—
Nicholas J. Weilhammer

This article discusses *State v. Clark*[152] where the Montana Supreme Court found Montana Rule of Evidence 803(8)[153] violated Montana's Confrontation Clause.[154] Rule 803(8) was a hearsay exception that allowed state crime laboratory reports to be admitted without the author testifying. The Court ruled this was unconstitutional because 803(8) prevented the defendant from meeting his accuser face to face. Such archaic language is unsuitable for modern times.

While Montana's Confrontation Clause was supposed to mirror the United States Constitution's, a majority of federal courts have ruled lab reports are admissible. Missouri and Nebraska have nearly identical provisions as Montana, but interpret theirs in accordance with the United States Supreme Court. Despite the similar language, the Montana Supreme Court unjustifiably diverges from other courts.

The Court in *Clark* was concerned with 803(8) not allowing the defendant an opportunity to cross examine the forensic scientist who prepared the report. While cross-examination is a vehicle for producing truth, the lab reports are not based on opinion but objective fact. Based on the circumstances, cross-examination provides little utility.

The language of Montana's Confrontation Clause should be modernized. Technology provides methods that make it unnecessary for all witnesses to testify, and amending the Confrontation Clause would allow judges to determine when a witness' testimony is necessary.

149. *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

150. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

151. Nicholas J. Weilhammer, *Face to Face: The Crime Lab Exceptions of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause*, 60 Mont. L. Rev. 167 (1999).

152. *State v. Clark*, 964 P.2d 766 (Mont. 1998).

153. Mont. R. Evid. 803(8) (1997).

154. Mont. Const. art. II, § 24.

Privacy in Cyberspace: Transcripts from the 1999 Judge James R. Browning Symposium[155]— Jeff Renz (moderator), Panelists: James Harvey, Larry Elison, Nancy Sinclair, Chris Tweeten, & Orson Swindle

Montana has a strong right to privacy.[156] How this right to privacy applies to internet usage and computers is still unknown. There are no court cases in Montana where the Court has faced a question about law enforcement using the tools of subpoenas and search warrants to obtain information stored on a computer.

The use of these tools has been limited by Montana's right to privacy. In *State v. Nelson*, the Court ruled for a subpoena submitted to a third party to be valid, the State must have probable cause before issuing the subpoena.[157] Otherwise, the subpoena violates an individual's right to privacy.

This may be problematic in cases where an adult solicits a minor online. "Fingerprints" are left every time an individual visits a website, and in solicitation cases, law enforcement subpoenas the internet service provider to obtain the "fingerprint" records. Whether this is constitutional in Montana is debatable.

While the Court has never directly answered the question, the Court has found that a reasonable expectation of privacy does not exist for telephone and electric records. If the Court were to apply the same reasoning to an internet case and determine there was no reasonable expectation of privacy for internet records, the subpoenaing of internet records would be constitutional.

Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications[158]— Matthew O. Clifford & Thomas P. Huff

This article explores the necessity of the Dignity Clause, as well as the purpose and unique meaning of the Dignity Clause of the Montana Constitution. While the conception of human dignity extends as far back as the Reformation era of the 14th and 15th centuries, it wasn't until the 19th century that our democratic government began using "dignity" as a means of enforcing such ideas as tolerance, justice, and fairness. Using the Dig-

155. Jeff Renz (moderator), Panelists: James Harvey, Larry Elison, Nancy Sinclair, Chris Tweeten, & Orson Swindle, *Privacy in Cyberspace: Transcripts from the 1999 Judge James R. Browning Symposium*, 61 Mont. L. Rev. 43 (2000).

156. Mont. Const. art. II, § 10.

157. *State v. Nelson*, 941 P.2d 441, 450 (Mont. 1997).

158. Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's Dignity Clause with Possible Applications*, 61 Mont. L. Rev. 301 (2000).

nity Clause of the Puerto Rican Constitution as its primary model, Montana instituted a Dignity Clause into its Constitution in 1972.

Although the Dignity Clause can be interpreted as a means of filling in the gaps of constitutionally protected rights, there are limitations to its application. One such limitation is that a Dignity Clause violation must be significant enough to offend a person's sense of humanity through the reduction of his worth as a human being. The Dignity Clause has been applied by United States Supreme Court in cases involving the mentally handicapped (*Cleburne v. Cleburne Living Center*[159]), gay and lesbian rights (*Romer v. Evans*[160]), and abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*[161]).

While it is undisputed that the Montana Constitution's Dignity Clause supports the ideal "that the dignity of the human being is inviolable,"[162] the Montana Supreme Court denied an invitation to address the Dignity Clause in the *Gryczan*[163] case, and instead opted to use the Privacy Clause as the basis for its opinion. The groundwork for the Dignity Clause has been established; it is now up to the Montana Supreme Court to continue interpreting and defining the scope and meaning of this clause.

Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases[164]—Brian M. Morris

This article explores the constitutionality of a "general unanimity" jury instruction. The article raises the question: To what extent must a jury unanimously agree on the details of a crime rather than the simple issue of guilt or innocence? In 1981, the Montana Supreme Court ruled that a jury does not have to agree unanimously on the specific mental state controlling the defendant's conduct.

When the relevant statute provides for alternative means of committing the particular offense, must the jury agree unanimously as to which means the defendant used? In *State v. Weaver*,[165] the Montana Supreme Court reversed the defendant's conviction based on the uncertainty caused by the general unanimity instruction regarding specific counts, reasoning that a specific unanimity instruction was necessary to satisfy the fairness of the

159. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

160. *Romer v. Evans*, 517 U.S. 620 (1996).

161. *Planned Parenthood of Southeastern Pa. v. Casey*, 503 U.S. 833 (1992).

162. *Id.* at 316.

163. *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

164. Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 Mont. L. Rev. 1 (2001).

165. *State v. Weaver*, 964 P.2d 713 (Mont. 1998).

defendant's trial. In *State v. Harris*,[166] the Court followed the course set out in *Weaver*, stating that "the jury is to be instructed that it must reach a unanimous verdict on at least one specific act for each count."[167]

Along with the constitutional issues raised in regards to general versus specific unanimity instructions, specific unanimity instructions help to eliminate jury confusion and give focus to the jury's deliberations. While such specific instructions may cause slight delays in our justice system, protecting the defendant's right to a unanimous verdict, as guaranteed by the Constitutions of Montana and United States, are of the utmost concern and importance.

Good Riddance to Good Faith?: Deciphering Montana's New Test for Subfacial Challenges to Search Warrant Affidavits[168]—
Peter William Mickelson

This comment discusses Montana's departure from the federally accepted *Franks* test. Arising from the United States Supreme Court case, *Franks v. Delaware*,[169] the *Franks* test requires a defendant to show that an affidavit statement was "deliberately false or made with reckless disregard for the truth."[170] With the decision of *State v. Worrall*,[171] this requirement was eliminated by the Montana Supreme Court. Now, defendants may challenge warrants solely on inaccuracies in supporting affidavits. The author questions whether Montana's departure from the *Franks* test was necessary, reasonable, or compatible with Montana policy. He argues that, because the Montana Supreme Court's interpretations of the search and seizure procedures mostly mirror those of the United States Supreme Court, it was inconsequential to refashion the *Franks* test in favor of criminal defendants.

With the *Worrall* decision, it has been confirmed that the Montana Supreme Court indeed interprets probable cause and the exclusionary rule differently than the federal courts. In modifying the *Franks* test, *Worrall* further attempts to shape federal search and seizure doctrines to comply with the Privacy and Warranty Clauses of the Montana Constitution. However, while Montana has stricter constitutional rules regarding searches and seizures, as well as a more comprehensive review than that required by the

166. *State v. Harris*, 983 P.2d 881 (Mont. 1999).

167. *Weaver*, 964 P.2d 713 at 721.

168. Peter William Mickelson, *Good Riddance to Good Faith?: Deciphering Montana's New Test for Subfacial Challenges to Search Warrant Affidavits*, 62 Mont. L. Rev. 175 (2001).

169. *Franks v. Del.*, 438 U.S. 154 (1978).

170. *Id.* at 176.

171. *State v. Worall*, 976 P.2d 968 (Mont. 1999).

federal constitution, the author remains skeptical of the Montana Supreme Court's decision to create a new precedent within this field of law.

MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions[172]—
John L. Horwich

This article criticizes the nature of the Montana Supreme Court's analysis in *Montana Environmental Information Center v. Department of Environmental Quality*.[173] This case, the first to interpret the environmental provisions included in Montana's 1972 Constitution, stemmed from DEQ's approval of the Seven-Up Pete Joint Venture's proposal of the McDonald Gold Mine Project (near Lincoln, Montana). The mine required water to be pumped out and discharged away from the site. Upon evaluation of the water, it was found the pumped water contained a higher concentration of arsenic than the water into which it would be discharged.

Montana's nondegradation policy prohibits the degradation of high-quality waters, which disallows pumped water to be discharged into water of a higher quality. However, this policy does not go without exceptions. The plaintiffs initiated suit against DEQ on the premise that the statutory nondegradation exemptions allowed by Montana's degradation policy violate the Montana Constitution's environmental provisions.

The Montana Supreme Court analyzed the case by addressing issues of constitutionality. The Court concluded that "the right to a clean and healthful environment" guaranteed by the Declaration of Rights in Article II, § 3 is a fundamental right.[174] Fundamental rights can only be denied if the actor who is denying the right has a compelling state interest to do so. To aid in their analysis, the Court relied heavily on the intent of those who wrote and voted for the 1972 Montana Constitution.

After a lengthy analysis of the case, the Court concluded that arbitrary exclusions permitted by the policy violate the rights guaranteed by the Montana Constitution. It remanded the case to the district court to be analyzed under strict scrutiny. The district court held the case moot, leaving the constitutionality of the nondegradation exemptions undetermined.

172. John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 Mont. L. Rev. 269 (2001).

173. *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999).

174. *Id.* at 275.

"No Armed Bodies of Men"—Montana's Forgotten Constitutional Right (With Some Passing Notes on Recent Environmental Rights Cases)[175]—Robert G. Natelson

This article explores the constitutionality of permitting out-of-state armed bodies of men into Montana for the preservation of peace. In July of 2000, without the authority of the Legislature or Governor, Missoula city police imported approximately seventy-six outside police officers to aid local law enforcement during a visit by the Hell's Angels Motorcycle Club. Article II, § 33 of the Montana Constitution states that no armed persons "or armed body of men shall be brought into this state for the preservation of the peace . . . except upon the application of the legislature, or of the governor when the legislature cannot be convened."[176]

The mayor of Missoula appointed a committee to investigate the incident that occurred between in-state and out-of-state law enforcement officers. The committee found the provision only applied to importations by private parties and that the Montana Interstate Law Enforcement Mutual Aid Act provided the necessary authority for the importation.[177]

Article II, § 33 does not state whether the provision applies to both public and private parties. The article explores the validity of the committee's decision based on historical and facial context. Because provisions in the Montana Declaration of Rights usually pertain to fundamental citizen rights against the government, government infringement of Article II, § 33 would only seem to be valid if it serves a compelling state interest.

The Issues of E-Mail Privacy and Cyberspace Personal Jurisdiction: What Clients Need to Know about Two Practical Constitutional Questions Regarding the Internet[178]—Mark S. Kende

This article addresses the constitutionality of employers monitoring employee e-mail on work computers. While jurisdictions in other states have granted employers such a right, the Montana Constitution contains stronger privacy and dignity provisions than those found in the U.S. Constitution and in other state constitutions.

---

175. Robert Natelson, *"No Armed Bodies of Men"—Montanans' Forgotten Constitutional Right*, 63 Mont. L. Rev. 1 (2002).

176. *Id.*

177. *Id.*

178. Mark Kende, *The Issues of E-Mail Privacy and Cyberspace Personal Jurisdiction: What Clients Need to Know About Two Practical Constitutional Questions Regarding the Internet*, 63 Mont. L. Rev. 301 (2002).

While the Montana Supreme Court has yet to address the issue of employer monitoring of employee e-mail, the author argues that employees might have greater legal recourse in Montana than in other states. In the recent Montana case of *State v. Siegal*,[179] the Montana Supreme Court held that police-use of thermal imaging was a search because it infringed upon a person's right to privacy. In *Siegal*, the Court discussed the 1972 Montana Constitution Convention and how the privacy provision was adopted largely to protect people's privacy rights in regard to "computerized data banks"[180] and other modern technologies.

This article also addresses the role of personal jurisdiction in cyberspace. Personal jurisdiction rests on the assertion that the defendant is sufficiently "present" within the forum state.[181] The trouble begins with trying to assign a website a specific location. A lot of controversy surrounds the cases that have confronted this issue. While several Ninth Circuit Court decisions suggest varying opinions on this issue, the decision in *Bedrejo v. Triple E Canada, Ltd.*[182] supports the conclusion that the Montana Supreme Court is hesitant to subject out-of-state companies to Montana jurisdiction, unless for reasons other than operating a website that is accessible to Montana residents.

The Montana Constitution: A National Perspective[183]—G. Alan Tarr

This article paints a picture about how the regional and national context shaped the 1972 Montana Constitution during its drafting. The article is broken into three sections. The first section discusses the development of the Montana Constitution from a regional perspective, the second section discusses the development from a national perspective, and the final section discusses the creation of the 1972 Montana Constitution.

Montana was one of six states to enter into the Union in 1889. This group of states was the largest to adopt their first constitutions in a single year since 1776.[184] Montana did not amend its Constitution nearly as many times as some of its neighbors. However, it did share flaws borrowed from other constitutions. Such flaws included fragmented executive branches and impossibly short and infrequent legislative sessions. Even with these problems, Montana is the only state out of the six that was able to overhaul its Constitution, rather than simply adding more and more amendments.

179. *State v. Siegal*, 934 P.2d 176 (Mont. 1997).
180. *Id.* at 191.
181. Kende, *supra* n. 178, at 320.
182. *Bedrejo v. Triple E Can., Ltd.*, 984 P.2d 739 (1999).
183. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1 (2003).
184. *Id.* at 2.

Only two other states have newer constitutions than Montana. However, Montana was jumping on the bandwagon when it revised its own Constitution because the majority of states had already changed their original constitutions at least once. This indicates that Americans think differently about their state constitutions than they do about the federal Constitution. Americans scrapping the federal Constitution and starting over seems quite unlikely.

The final section of the article discusses the provisions that the 100 delegates used as a starting point, as well as the new provisions inspired by the times, and by trial and error in the past. In summary—the Montana Constitution was not drafted in a vacuum.

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle)[185]—Gregory J. Petesch

The unusual name of this article comes straight from the words of a Constitutional Convention delegate. Delegate J.C. Garlington stated that the new 1972 Montana Constitution should consist of a basic fundamental framework for a functioning government, and the delegates should not try to make it more by trying "to stick turkey feathers into the constitutional eagle."[186]

This article begins with a discussion of several of the provisions that shaped the structure of the government and why those provisions were included. Several provisions were inserted or moved to appease those whose votes the Legislature needed to ratify the newly drafted Constitution, such as county officials. Some of the decisions to include provisions, like enumerating elected county officials and enumerating the then existing county form of government, have led to struggles between the counties and the Legislature.

Next, the article discusses the size limitations imposed on the Senate and the House of Representatives and the impact of reapportionment and redistricting plans on those numbers. Comically or tragically, depending on one's perspective, the education provisions seemed to cause as much confusion regarding funding and appropriate structure at the time they were included as they do now. The author discusses several Montana Supreme Court decisions that deal directly with these provisions. The remainder of the article focuses on the changes that Montanans have made to the Constitution through the initiative and referendum processes. The article closes

185. Gregory J. Petsch, *The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle)*, 64 Mont. L. Rev. 23 (2003).

186. *Mont. Const. Conv. Procs.*, vol. VII, 2260 (1971–1972).

by noting that the political climate will continue to shape our Montana Constitution.

Signature Gathering in the Initiative Process: How Democratic is it?[187]—Richard J. Ellis

The author argues the signature gathering phase of the initiative process needs greater scrutiny by not only the voters, but also the media, state elections officials, and scholars. A bit of romance exists in the notion that the initiative process is the ultimate form of democracy, with individuals braving the elements to collect signatures for their cause. The unfortunate truth, however, is that the initiative and signature gathering process is increasingly becoming a business to some, and those braving the elements to gather signatures are more likely hired-guns, paid per signature, rather than ideological community members fighting for their cause.

One major problem with this development is, unlike election campaigns where limits are in place as to how much one can donate to a candidate, no similar restrictions exist on the initiative process. Another issue with initiatives is, unlike the election process, where a candidate is selected by his party and must win a primary election prior to appearing on the general election ballot, initiatives undergo no such popular scrutiny. Although the voters ultimately decide the issue, whether the issue passes often depends on how the proposition is worded. For example people respond much more favorably to allowing terminally ill patients to "die with dignity" than they do to "physician assisted suicide."

This article closely examines the nuances of the signature gathering process. Not only is this article an eye-opener, it is extremely informative as to how this mysterious process really works and the history behind its development.

The Right to Privacy Under the Montana Constitution: Sex and Intimacy[188]—Patricia Cain

This article explores how the legal concept of privacy applies to sexual intimacy under the Montana Constitution. The article also asserts that Montana's recognition of a privacy right for sexual intimacy in the *Gryczan*[189] case should inform interpretations of privacy under the federal Constitution, and that the United States Supreme Court should declare the

187. Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic is it?*, 64 Mont. L. Rev. 35 (2003).

188. Patricia Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 Mont. L. Rev. 99 (2003).

189. *Gryczan v. State*, 942 P.2d 112 (1997).

right of privacy in sexual intimacy as a fundamental right. In *Gryczan*, the Montana Supreme Court held that Montana's constitutional right of privacy included the right of same-sex, consenting adults to engage in non-commercial, private, sexual relations.[190]

The reasoning used in *Gryczan* has been criticized for applying the Privacy Clause rather than the Dignity Clause of the Montana Constitution. The author argues that the Montana Supreme Court correctly reasoned that privacy, not dignity, was the correct justification for its conclusion because sexual intimacy is a relational interest in developing one's selfhood, which requires privacy. Privacy includes both the literal and metaphorical space upon which the government may not intrude. Within this literal and metaphorical space, which is protected by the legal concept of privacy, an individual creates self. Protection of this self-creating space is necessary for the full development of an individual's self and necessary for avoiding the ills of social conformity.

Finally, the author argues that the United States Supreme Court should declare a right to sexual intimacy as a fundamental privacy right under the federal Constitution because most states protect sexual intimacy, and it is fundamentally unfair for a person's rights to sexual intimacy to change significantly when the person crosses state lines.

The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?[191]—Heinz Klug

Following the Second World War, several constitutions included clauses that protect human dignity. Countries such as Germany and South Africa have developed jurisprudence around their dignity provisions, which may help Montana litigants and courts address and define the meaning of the Montana Constitution's Dignity Clause. Human dignity is the core principle of human rights; it creates in people a sense of self worth. A constitutionally protected right to dignity is different. Constitutional dignity manifests in specific fact circumstances—like the death penalty, voluntary enslavement, or assisted suicide—and requires specific legal remedies.

Human dignity could be constitutionally recognized in five distinct forms of a right. First, dignity could be a classic individual right, which would combine with other constitutional rights to protect an individual's privacy, reputation, self-expression, and bodily integrity. Second, dignity could be recognized as a background right to other rights. Third, dignity

190. *Id.* at 125–26.

191. Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 Mont. L. Rev. 133 (2003).

could be recognized as a foundational principle, i.e. the right by which all other rights are understood. Fourth, dignity could be recognized as a distinct, substantive constitutional right. Finally, dignity could be recognized as both a right with independent, substantive content and one that serves as an overarching principle to understand other constitutionally protected rights.

The manifestation of a substantive right to dignity could limit criminal sanctions—like the death penalty, life sentences, and juvenile discipline. The right to dignity could preclude the use of lethal force in an attempt to arrest a criminal, influence the development of rights to personhood and equality, affect the right to information and freedom of expression, and ensure the right of access to a minimal amount of socio-economic resources.

Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions[192]—Barton Thompson

This article explores the environmental provisions of the Montana Constitution and the Montana Supreme Court's rulings in *MEIC*[193] and *Cape-France*[194] as unprecedented applications of strict scrutiny to environmental policy disputes. Montana's constitutional provisions are considered to be on the forefront of constitutional protections for the environment. The Montana Constitution labels the "right to a clean and healthful environment" as an "inalienable" right, requires every citizen to protect the environment, recognizes the environmental interests of "future generations" and provides for the improvement of the environment.

In *MEIC*, the Montana Supreme Court concluded that the exemption from non-degradation review of test wells that released arsenic-laced groundwater into the Blackfoot River was a constitutional violation of Montanans' fundamental right to a "clean and healthful" environment. In *Cape-France*, the Montana Supreme Court refused to enforce a real estate contract that required the landowner to drill a test well, which may have released a toxic plume to an uncontaminated aquifer, because enforcing the contract was not a compelling state interest to justify infringing Montanans' fundamental right to a "clean and healthful" environment.

These developments in Montana Constitutional law provide environmental lawyers unique authority to strengthen and expand Montana's environmental laws. The Montana Supreme Court will have to consider economic tradeoffs intrinsic to environmental policy disputes in future deci-

192. Barton Thompson, *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 Mont. L. Rev. 157 (2003).

193. *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999).

194. *Cape-France Enters. v. Est. of Peed*, 29 P.3d 1011 (Mont. 2001).

sions. The Court might accomplish this by abandoning strict scrutiny, redefining strict scrutiny to permit cost tradeoffs, substituting strict scrutiny with balancing tests, or controlling its interpretation of the type of disputes that trigger constitutional review.

The Challenge of "Differentiated Citizenship": Can State Constitutions Protect Tribal Rights?[195]—Rebecca Tsosie

Article X, § 1(2) of the Montana Constitution could help achieve justice for Indian and non-Indian people of Montana if its intent and potential were more fully realized in the relationships between tribal and state governments. The clause provides, the "state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural identity."[196] Because the provision has not been implemented consistently, its full potential has not yet been achieved.

The history of the political, cultural, and educational status of Indians and tribes has been unsteady and volatile in vision, funding, implementation, and cultural respect. However, the 1999 enactment of Montana House Bill 528 holds promise for interactive relationships between tribes and the State of Montana. House Bill 528, enacting Article X, § 1(2), encourages Indians and non-Indians to engage in learning about the history, traditions, and culture of American Indians. It particularly encourages local development of learning curricula focused on nearby Indian tribes and their traditions.

Education of Indian heritage may lead to stronger relationships and solutions to current and future conflicts between the State and tribes. Article X, § 1(2) recognizes the importance of this heritage to contemporary society. Principles of constitutionalism, pluralism and multiculturalism, civic virtue, and fundamental rights supplement the full implementation of Article X, § 1(2) to help structure future relationships, protect rights to education and cultural integrity, and manifest the promise for a positive and visionary relationship between Montana, Indian nations, and their citizens.

195. Rebecca Tsosie, *The Challenge of "Differentiated Citizenship": Can State Constitutions Protect Tribal Rights?*, 64 Mont. L. Rev. 199 (2003).

196. Mont. Const. art. X, § 1(2).

The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles[197]—Melissa Harrison & Peter Mickelson

This article contends that in about 1993 the Montana Supreme Court, after an aberration in the mid-1980s, returned Montana's search and seizure jurisprudence to a privacy enhanced analysis, which is more consistent with the framers' intent and the case law immediately following the Constitutional Convention. Article II, § 11 of the Montana Constitution tracks the federal Constitution and prohibits warrantless searches and seizures.[198] Article II, § 10 guarantees Montanans' privacy rights.[199] Convention delegates understood §§ 10 and 11 to be companion provisions that ensured Montanans' right to be let alone.

In the early period, Montana courts adhered to some federal jurisprudence, but developed a purely independent privacy-based analysis for search and seizure issues. In 1985, the Montana Supreme Court announced that it was "not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection."[200] After this announcement, however, the Montana Supreme Court distanced its search and seizure from the privacy guarantees of the Montana Constitution. However, beginning in the early 1990's, the court returned to a privacy-enhanced analysis.

The article compares these three periods' treatment of the automobile, search incident to arrest, and open fields exceptions, as well as surveillance and standing doctrine. It concludes by suggesting the Montana Supreme Court buttress its privacy-enhanced analysis in search and seizure cases with the rich legislative history and intent that values expansion of individuals' privacy rights.

Technology's Future Impact on State Constitutional Law: The Montana Example[201]—Mark Kende

This article discusses how technological advances in areas like biotechnology, cyberspace, artificial intelligence, nano-technology, and cryonics will affect Montana constitutional law. After tracing the history of Montana constitutional law in the technology arena and the role of federal

197. Melissa Harrison & Peter Mickelson, *The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles*, 64 Mont. L. Rev. 245 (2003).

198. Mont. Const. art. II, § 10.

199. *Id.* at art II, § 11.

200. *State v. Sierra*, 692 P.2d 1273, 1276 (Mont. 1985).

201. Mark Kende, *Technology's Future Impact on State Constitutional Law: The Montana Example*, 64 Mont. L. Rev. 273 (2003).

preemption, the article examines two cases that could confront the Montana Supreme Court—a legislative ban on human cloning and an insurance company's unauthorized use of a person's genetic data to set health insurance rates.

New technologies may give rise to novel and unforeseen controversies that involve multiple parties and create complex situations that cannot be neatly resolved by traditional constitutional review. For example, the rigid categorical approaches to constitutional issues may not satisfactorily resolve a custody dispute over fertilized embryos in divorce proceedings where multiple interests of several parties are involved. The author suggests the Montana Supreme Court develop fact-specific balancing approaches for resolution of constitutional issues involving complex disputes created by technological advancements.

The article also argues that the Montana Constitution's Privacy Clause applies to non-government actors because the framers intended it be so, the Clause's language is not limited to the government, public policy supports such an interpretation, and the Montana Constitution's Dignity Clause shows that citizens should be protected against non-governmental privacy intrusions. For example, an insurance company would violate a person's privacy by using the person's genetic data to set rates or a non-government employer would violate an employee's privacy right by e-mail monitoring.

Taking Liberties: Analysis of In re Mental Health of K.G.F.[202]—
Elaine M. Dahl

Involuntary civil commitment—the process by which the state obtains a court order requiring a mentally ill person to stay at a facility or follow a specific treatment program—raises constitutional issues concerning dignity, a state's duty to protect society and individuals, and "medical-decision personal autonomy." In *Mental Health of K.G.F.*[203] these issues were discussed in the context of a woman with "mixed rapid cycling bipolar disorder"—a disorder that causes a person's moods to rapidly alternate, often causing her to experience mania and depression at once. It was in this context that K.G.F., a suicidal woman, voluntarily admitted herself to a hospital in Helena for treatment. During her stay at the hospital she became concerned about her medication to the point that she refused to take her prescribed medication, prompting a deputy county attorney to petition for her involuntary commitment because she posed a threat to herself. The district

202. Elaine M. Dahl, *Taking Liberties: Analysis of In re Mental Health of K.G.F.*, 64 Mont. L. Rev. 295 (2003).

203. *In re Mental Health of K.G.F.*, 29 P.3d 485 (Mont. 2001).

court judge ordered her to be involuntarily committed to a community treatment center. K.G.F. appealed the involuntary commitment.

On appeal, the Montana Supreme Court concluded that K.G.F.'s right to dignity and autonomy must be balanced with the State's duty to protect society and individuals; it remanded the case and ordered the district court to conduct such an analysis. The Court unfortunately did not outline criteria for the district court to use in balancing these rights. And as the author suggests, "Only those who have experience with the mental health system can fully understand the practical implications of ethereal debates about liberty, autonomy, dignity, community, government, compassion, and understanding. Precisely because civil commitment raises issues about these core values of society, it will remain a controversial subject."[204]

The Slippery Definition of 'Marital Status' and Religious Organizations' Free Reign to Discriminate, a Casenote on Parker-Bigback v. St. Labre School[205]—Edward T. LeClaire

This casenote discusses *Parker-Bigback*,[206] a case concerning Montana's constitutional right to the free exercise of religion[207] and the right to be free from discrimination.[208] In the case, Parker-Bigback—an unmarried former employee of St. Labre (a private Catholic school)—was fired after her supervisor and priest found out that she was living with a man while unmarried. St. Labre justified the firing with its expectation that school employees act as Christian role models to its students, that such a living situation is contrary to the doctrines and principles of the Catholic Church, and that Parker-Bigback agreed to avoid such conduct in her employment agreement with the school. Parker-Bigback filed a discrimination suit under Montana Code Annotated § 49–2–303, which makes it unlawful for employers to discriminate based on marital status. The district court ultimately granted summary judgment to St. Labre—relying on the "free exercise" clause of the First Amendment.

On appeal, the Montana Supreme Court affirmed the decision, holding that Parker-Bigback was not terminated because of her *marital status* but because of her *conduct*—living, while unmarried, with a person of the opposite sex. Concluding that marital status was irrelevant to the termination, the Court determined that the result would have been the same if Parker-

204. Dahl, *supra* n. 202, at 331.

205. Edward T. LeClaire, *The Slippery Definition of 'Marital Status' and Religious Organizations' Free Reign to Discriminate, a Casenote on* Parker-Bigback v. St. Labre School, 64 Mont. L. Rev. 333 (2003).

206. *Parker-Bigback v. St. Labre Sch.*, 7 P.3d 361 (Mont. 2000).

207. Mont. Const. art. II, § 5.

208. *Id.* at art. II, § 4.

Bigback were married yet living with someone she was not married to. Reiterating the fact that Parker-Bigback agreed to avoid such conduct in her employment contract, the Court affirmed the district court's grant of summary judgment. The author questions the Court's reasoning, highlighting the fact that "[i]n Montana, individuals are afforded more rights than under the federal constitution. The jurisprudential analysis should reflect this difference."[209]

Murky Waters: Private Action and the Right to a Clean and Healthful Environment an Examination of Cape-France Enterprises v. Estate of Peed[210]—Chase Naber

This article discusses the Montana Constitution's guarantee that (1) all persons have an inalienable right to "a clean and healthful environment"[211] and (2) "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[212]

Cape-France[213] was an action for specific performance of a buy-sell agreement for real property in which the purchaser wanted to build a hotel on the property. The concern was that perchlorethylene had been detected in the Bozeman aquifer, and, as such, the Department of Environmental Quality made annual sampling a condition for construction of the hotel. Because three years passed and the deal was still pending, the purchasers filed a motion for summary judgment seeking specific performance—which, if granted, would force the seller to complete the procedures necessary to finalize the transaction and construct the hotel.

The Montana Supreme Court ultimately rescinded the agreement, finding that it exposed the public to potential health risks and potential environmental degradation. However, as the author points out, in rescinding the agreement the Court neglected to balance the public's right to a clean and healthful environment with the permissible degradation related to economic and social development—a requirement under *MEIC*.[214]

---

209. LeClaire, *supra* n. 205, at 353.

210. Chase Naber, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment an Examination of* Cape-France Enterprises v. Estate of Peed, 64 Mont. L. Rev. 357 (2003).

211. Mont. Const. art. II, § 3.

212. *Id.* at art. IX, § 1.

213. *Cape-France Enters. v. Est. of Peed*, 29 P.3d 1011 (Mont. 2001).

214. *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999).

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost[215]—John Carter

In this article the author argues that the drafters of the 1972 Montana Constitution mistakenly ignored the federal doctrine of Indian reserved water rights when they expanded the state constitutional provision on water rights.[216] The federal doctrine had existed for over 60 years when the Constitutional Convention met in 1972. It directly conflicted with the constitutional language proclaiming Montana as the owner of all waters in the State.

Carter argues there should have been an additional provision in Article IX, § 3, recognizing Indian reserved rights. The drafters' failure to include native water rights has resulted in numerous conflicts between the State of Montana, tribes, private citizens, and the federal government. The recognition of Indian Tribes' water rights would have spared all parties repeated litigation that has continually affirmed the dominance of federally protected Indian reserved water rights over any state law claims.

Restoring Private to Privacy[217]—Jeffery T. Renz

This article argues that the Montana Supreme Court was incorrect in limiting the constitutional right of privacy[218] to circumstances of state action. In *State v. Long*,[219] the Court determined that the right to privacy could not protect against private action because it specifically mentioned state conduct and was silent with regard to private actors. However, prior to the 1972 Constitution, there was a line of precedent protecting individual privacy from both public and private actors. Additionally, the constitutional debates and literature distributed to voters evidenced the drafters' intent to constrain both the State and private citizens. As a result, the history of Montana's right to privacy contradicts the Court's narrow interpretation of its protective scope.

215. John Carter, *Indian Aboriginal and Reserved Water Rights, an Opportunity Lost*, 64 Mont. L. Rev. 377 (2003).

216. Mont. Const. art. IX, § 3.

217. Jeffery T. Renz, *Restoring Private to Privacy*, 64 Mont. L. Rev. 385 (2003).

218. Mont. Const. art. II, § 10.

219. *State v. Long*, 726 P.2d 1364 (1986).

Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse[220]—Vicki C. Jackson

This article explores the Human Dignity Clause[221] of the Montana Constitution in the context of trans-boundary influences. Montana's human Dignity Clause was borrowed from the Puerto Rican Constitution. Puerto Rico had been directly influenced by the Universal Declaration of Human Rights and the German Basic Law. The inclusion of this Clause in the Montana Constitution demonstrated recognition that human dignity was achieving the status of a fundamental value in the wake of World War II.

The Montana Supreme Court's treatment of the Dignity Clause illustrates the interaction between the new idea of human dignity and the existing paradigm of constitutional rights. Although international treatment of human dignity has broadly recognized the right to encompass certain social welfare commitments, Montana's Clause has not been interpreted this way. Instead, it has been used to reinforce explicit rights including the prohibition of unlawful searches and seizures, protection from governmental discrimination, and privacy.

Although the Montana Supreme Court has generally tacked its interpretation of Article II, § 4 to the Equal Protection Clause of the Federal Constitution, it has occasionally recognized the potential independence of the Dignity Clause. Such expansive interpretations have occurred with regard to polygraph tests, abortions, gender-bias, and cruel and unusual punishment. While it is unclear whether these small inroads on the discourse of dignity are a harbinger of greater use in the future, the potential exists for Montana to utilize transnational interpretation to develop a constitutional concept of dignity.

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity[222]—Amanda K. Eklund

In this article the author argues that capital punishment is inhumane and demeaning psychological torture that violates the dignity protections guaranteed in the Montana Constitution.

First, the author identifies the Dignity Clause in the Montana Constitution and discusses how it has been interpreted and used.[223] The author then supports her position by citing studies that suggest capital punishment is a

220. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15 (2004).

221. Mont. Const. art. II, § 4.

222. Amanda K. Eklund, Student Author, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 Mont. L. Rev. 135 (2004).

223. Mont. Const. art. II, § 4.

racially biased institution. Further discussion focuses on the punishment as extreme psychological torture and how the death penalty dehumanizes individuals forced to impose the sentence and those who perform the execution. That the death penalty deprives a prisoner of his right to control what happens to his body is an additional reason presented in the argument that capital punishment violates Montana law.

International criticism has targeted the United States for its refusal to abolish the death penalty. The author suggests that Montana should follow the lead of the European and non-European countries that abolished the death penalty. In Montana, the author argues, where individuals are guaranteed greater rights, the death penalty has no place.

It's Good to be the Game Warden: State v. Boyer *and the Erosion of Privacy Protection for Montana Sportsmen*[224]—
Malin J. Stearns

In this note, the author criticizes the legal analysis in *State v. Boyer.* The author claims the Court eroded privacy protections and incorrectly implicated environmental protections in the Montana Constitution.

According to the author, in *State v. Boyer*[225] the Montana Supreme Court reasoned that society is not willing to accept that one has a reasonable expectation of privacy in the fish kept in a live well. Such an expectation could lead to the unnecessary depletion of fish, a resource protected by the Montana Constitution through the Clean and Healthful Environment Clause. The Court also held that the game warden needed only particularized suspicion to stop and board Boyer's boat.

Although the author believes the outcome of the case was likely correct, the author criticized the Court for not requiring game wardens to have probable cause before boarding a boat and looking into a live well. The author argues that the transom of the boat should be afforded constitutional privacy protections. Additionally, the author argues that under *Boyer*, "searches are justified by what wardens find, not by where or how they conduct the search."[226] The analysis suggests that the holding unnecessarily eroded privacy rights in Montana.

224. Malin J. Stearns, Student Author, *It's Good to be the Game Warden:* State v. Boyer *and the Erosion of Privacy Protection for Montana Sportsmen*, 65 Mont. L. Rev. 187 (2004).

225. *State v. Boyer*, 42 P.3d 771 (Mont. 2002).

226. *Id.* at 213.

Death with Dignity in Montana[227]—James E. Dallner & Scott Manning

In this article the authors discuss the right of doctors to give, and terminally ill patients to receive, medical assistance in hastening death. The authors begin by suggesting that medical and technological advancements that prolong life shift our paradigm of dying and requires society and the legal system to reconsider issues surrounding hastening death. Although the authors admit that economics should not be the deciding factor in the rights of the dying, they explain "new patterns in dying are not only more prolonged, they are also far more costly."

While the United States Supreme Court has upheld the right of states to prohibit assisted suicide, federal law does not prohibit a state from permitting doctors to honor requests to medically hasten death. The authors analyze Montana's Constitutional framework and point out that Montana need not "walk lock step" with the federal government.

According to the authors, the right to dignity enumerated in the Montana Constitution qualifies the State's interest in preserving life and requires the State to recognize and honor an individual's quality of life as it pertains to individual conceptions of dignity. They suggest using Oregon's Death with Dignity statute as a model to expand the Montana Rights of the Terminally Ill Act.

Will Montana Breathe Life into its Positive Constitutional Right to Equal Educational Opportunity?[228]—Hillary A. Wandler

This article argues that, although the Montana Constitution mandates educational quality and equality, these ideas remain an illusion.[229] Montana courts have failed to define quality education, and the Legislature has wrongly interpreted equality in education to only mean fiscal equality. Although not everyone would agree on what equal educational opportunity entails, the best approach is to also consider the distinct needs of different schools and students.

The history of Montana's education system unfolds like a rollercoaster, with both highs and lows. Even though the Montana Supreme Court has previously held the State's system of funding public schools unconstitutional, the Court has failed to provide any specific guidance on how to resolve the problem. Thus, confusion persists regarding how to administer the constitutional duties to provide both educational quality and equality.

227. James E. Dallner, Student Author, & Scott Manning, *Death with Dignity in Montana*, 65 Mont. L. Rev. 309 (2004).

228. Hillary A. Wandler, *Will Montana Breathe Life into its Positive Constitutional Right to Equal Educational Opportunity?*, 65 Mont. L. Rev. 343 (2004).

229. Mont. Const. art. X, § 1.

Both New Jersey and Wyoming offer lessons and guidance on this issue. Also, in order to remedy this problem, the Montana Supreme Court must recognize that the Montana Constitution mandates dual duties regarding education—quality and equality. Finally, any future educational funding scheme should be subject to periodic review, and must consider the particular requirements of students, schools, and districts.

State v. Robinson: Free Speech, or Ichin' for a Fight?[230]—Thomas W. Korver

The author argues that the Montana Supreme Court incorrectly held in *State v. Robinson*[231] that insults spoken by the defendant to a police officer constitute fighting words, and therefore the speech was not protected by the First Amendment to the United States Constitution.[232] Although the United States Supreme Court has historically found the First Amendment is not an absolute protection to all speech, the United States Supreme Court and the Ninth Circuit Court of Appeals have applied the fighting words exception more narrowly when the fighting words are spoken to a police officer. Montana, however, incorrectly applies the exception broadly, even when the speech is directed at a police officer.

The *Robinson* majority based its decision on factually distinguishable and obsolete precedent. The Court missed an opportunity to base its decision on sound legal grounds. Further, the Court inappropriately seized the written opinion as an opportunity to insult the defendant. Arguably, the majority reached the right conclusion in terms of public policy. However, the Court overreached its position by failing to follow United States Supreme Court precedent.

Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point[233]—Mary Helen McNeal

This article argues that under the Administration of Justice Clause,[234] the Dignity Clause,[235] and the Unenumerated Rights Clause[236] in the Montana Constitution, together with § 1–1–109 of the Montana Code Anno-

230. Thomas W. Korver, Student Author, State v. Robinson*: Free Speech, or Ichin' for a Fight?*, 65 Mont. L. Rev. 385 (2004).

231. *State v. Robinson*, 82 P.3d 27 (Mont. 2003).

232. U.S. Const. amend. I.

233. Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 Mont. L. Rev. 81 (2005).

234. Mont. Const. art. II, § 16.

235. *Id.* at art II, § 4.

236. *Id.* at art. II, § 34.

tated,[237] indigent litigants must, in some situations, be afforded free counsel in civil proceedings. For example, where a fundamental right to parent is at stake, the indigent litigant must be represented by counsel at all stages of a proceeding.

Pursuant to the Montana Constitution, individuals have a fundamental right to access the courts, but this right can be meaningless without the assistance of counsel. This fundamental right works in tandem with the Dignity Clause and right to parent. To deny an indigent litigant counsel does injury to her dignity, especially when this effectively denies the litigant meaningful access to the courts, and the individual's fitness as a parent is being questioned.

While the Montana Supreme Court has ruled that indigent litigants be represented in termination proceedings, the Court has refused to broaden this rule to include pre-termination proceedings. However, the Court should extend the rule in all phases of the process because the evidence gathered during the pre-termination phase, during which the litigant is unrepresented, is used in later phases of the process. This rule should extend to abuse, neglect, and custody disputes, as well, because these are situations in which the fundamental right to parent is similarly at stake.

The War Against Arbitration in Montana[238]—Scott Burnham

The Montana Supreme Court's limitation of arbitration clauses is critically examined in this article in light of the Montana Constitution's protection of the rights of "pursuing life's basic necessities," "acquiring, possessing, and protecting property,"[239] access to the courts,[240] and trial by jury. The rights to pursue life's necessities and deal in property would be meaningless without freedom of contract. The Montana Supreme Court, through its trilogy of *Casarotto* opinions, *Iwen v. U.S. West Direct*, and *Keystone Inc. v. Triad Systems Corp.*, has eliminated Montanans' "freedom to contract to have their disputes resolved in another jurisdiction."[241] The Court cited the constitutional protections of access to the courts and speedy resolution in declining to enforce the forum selection clauses in those cases.[242]

The Court finally won its war against arbitration in *Kloss v. Edward Jones & Co.*,[243] basing its decision primarily on the doctrine of reasonable expectations. The Court enumerated several factors that it would consider

237. Mont. Code Ann. § 1-1-109 (2003).
238. Scott J. Burnham, *War against Arbitration in Montana*, 66 Mont. L. Rev. 139 (2005).
239. Mont. Const. art. II, § 3.
240. *Id.* at art. II, § 16.
241. Burnham, *supra* n. 238, at 184.
242. *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999).
243. *Kloss v. Edward Jones & Co.*, 54 P.3d 1 (Mont. 2002).

in future cases when examining the enforceability of arbitration clauses. The author questions whether it is even possible to draft an enforceable arbitration clause given the *Kloss* factors. The article concludes by questioning the Court's extreme regulation—to the point of prohibition—of arbitration clauses as paternalistic interference in Montanans' right to freedom of contract.

The Right to Participate and the Right to Know in Montana[244]—Fritz Snyder

The Montana Constitution's rather unique right to participate[245] and right to know[246] provisions are examined in this article. Both sections are within the Constitution's Declaration of Rights. The right to participate provides that the public has a right to participate in the operation of state agencies prior to a final decision being reached, while the right to know allows citizens to examine documents and observe deliberations of state agencies except when the right to privacy clearly exceeds the public's right to know. These Constitutional provisions allow Montana's citizens greater access to state government decision-making than most other American citizens enjoy, and the Montana Supreme Court has diligently protected these provisions since their inception.

Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right[247]—Lisa M. Polk

This comment analyzes Montana's Marriage Amendment under the 14th Amendment's Equal Protection and Due Process Clauses, and argues that the Amendment is unconstitutional under both. The Amendment was passed in 2004 by CI-96, and it recognizes marriage only between one man and one woman.[248] The United States Supreme Court has consistently held marriage to be a fundamental right and recently defined marriage as a beneficial societal institution that provides economic, legal, and social advantages. Because this definition can be equally applied to heterosexual and homosexual couples, there is no compelling state interest or rationale reasonably related to a legitimate state interest preventing homosexual couples from marrying. Thus, Montana's Marriage Amendment is unconstitutional and should be repealed.

244. Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 Mont. L. Rev. 297 (2005).

245. Mont. Const. art. II, § 8.

246. *Id.* at art. II, § 9.

247. Lisa M. Polk, *Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right*, 66 Mont. L. Rev. 405 (2005).

248. Mont. Const. art. XIII, § 7.

A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question[249]— Alex Sienkiewicz

This article explores the inherent tensions between the Montana Constitution's guarantee of a "clean and healthful environment"[250] and the administration of state trust lands. When Montana gained statehood in 1889, the United States granted it more than 5 million acres of state trust lands for the purpose of supporting public institutions, such as schools and universities, through revenue generation. Revenue is generated through timber harvesting, grazing and farming leases, recreational use, commercial development, and land sales and exchanges, among other means. Montana's public education system is heavily dependent on this revenue.

Tensions arise between the administration of state trust lands and the right to a clean and healthful environment when the lands are administered for the sole purpose of generating revenue. In order to maintain a free, quality public education system (which is also guaranteed by the Montana Constitution[251]), the Land Board, which administers the land, might be forced to make short-sighted decisions that maximize revenue but simultaneously undermine the ecological value of the land (e.g., unsustainable timber harvesting). The mandate to generate sufficient funds for public education might override the fundamental right to a clean and healthful environment. The author argues new legislation is needed to ensure that state land trusts are providing adequate revenue while preserving Montanans' right to a clean and healthful environment.

Keynote Address: The Right to Privacy[252]—Justice James C. Nelson

This annotated transcript of Justice Nelson's keynote address sets the stage for the Montana Law Review's Honorable James R. Browning Symposium on the right to privacy (held October 11–13, 2006). Justice Nelson described a variety of ways in which Montanan's right to privacy—guaranteed by the Montana Constitution[253]—is under attack. Whether that right is threatened by legislation aimed to curb terrorism or searches made possible by new technologies, Montanans must fiercely guard their constitutional Right to Privacy. Justice Nelson's address concludes with highlights of speakers and panelists who presented at the Symposium.

249. Alex Sienkiewicz, *A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question*, 67 Mont. L. Rev. 65 (2006).

250. Mont. Const. art. II, § 3.

251. *Id.* at art. X, § 1.

252. Justice James C. Nelson, *Keynote Address: The Right to Privacy*, 68 Mont. L. Rev. 257 (2007).

253. Mont. Const. art. II, § 10.

Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying[254]—Kathryn Tucker

This article asks whether the Montana Supreme Court would (and should) recognize a right to receive aid in dying under the Montana Constitution. The author begins by asking whether state versions of the landmark federal cases *Vacco v. Quill*[255] and *Washington v. Glucksberg*[256] would succeed if brought before the Montana Supreme Court. For a number of reasons, the author argues the Montana Supreme Court would uphold the right to receive aid in dying. First, as illustrated in the Montana Supreme Court's analysis of the State's constitutional right to privacy, protection under the State Constitution is more sweeping than that of the United States Constitution. Second, Oregon's Death with Dignity Act[257]—the only act of its kind in 2007—might provide a viable framework to implement the right to receive aid in dying. Third, Americans, now more than ever, are accepting that individuals should be permitted to make end-of-life choices if they suffer from an incurable disease. Finally, and more specifically, pain and symptom management have been important issues for Montana's State government and private health care organizations. While the federal government has not recognized the right to receive aid in dying, Montana could be in a unique position to recognize this right.

Bespeaking Justice: A History of Indigent Defense in Montana[258]—James Park Taylor

This article explores the history of the right to counsel granted to the criminally accused under the Montana Constitution.[259] While the language of the constitutional guarantee has remained unchanged since Montana adopted its original Constitution in 1889, the Legislature's ability to effectively provide that right to indigent adult defendants has varied greatly. In this regard, the most difficult issue has always been finding an adequate source to fund such representation. For years, Montana was notorious for its inadequate provision of public defense; however, the Montana Public

254. Kathryn Tucker, *Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying*, 68 Mont. L. Rev. 317 (Mont. 2007).

255. *Vacco v. Quill*, 521 U.S. 702 (1997) (as the author notes, "holding that the right to assistance in committing suicide was not a fundamental liberty interest in and that the State of Washington's ban on assisted suicide was rationally related to several governmental interests").

256. *Wash. v. Glucksberg*, 521 U.S. 702 (1997) (as the author notes, "holding that the right to assistance in committing suicide was not a fundamental liberty interest and that the State of Washington's ban on assisted suicide was rationally related to several governmental interests).

257. Or. Rev. Stat. Ann. §§ 127.800–127.897 (West 2005).

258. James Park Taylor, *Bespeaking Justice: A History of Indigent Defense in Montana*, 68 Mont. L. Rev. 363 (2007).

259. Mont. Const. art. II, § 24.

Defender Act, which was enacted in 2005, is considered one of the nation's most forward-looking pieces of indigent defense legislation.[260]

The Right to Participate, The Right to Know, and Electronic Voting in Montana[261]—Brian J. Miller

This article explores the possibility that provisions of the Montana Constitution could provide Montana residents with the opportunity to discover sensitive information regarding the operation of electronic voting machines. Many jurisdictions have begun using electronic machines to streamline the voting process and increase public confidence in voting results. However, a number of suspicious election and testing results have caused many to question the accuracy of these machines as well as their vulnerability to hacking and election fraud. Unfortunately, most of these machines are designed and developed by private companies, and trade secret laws have prevented the public from discovering how the software and source code installed on these machines actually counts the votes.

Montana uses electronic voting machines manufactured by Election Systems & Software, Inc., the same company whose machines have come under scrutiny in other jurisdictions. If such a controversy were to arise in Montana, the right to participate[262] and right to know[263] guaranteed to citizens under the Montana Constitution may provide means for Montanans to defeat a trade secrets defense and compel production of software and source code information. Generally, in combination, the right to participate and right to know maximize citizen access to, and knowledge regarding, government decision making. If these provisions could be used to obtain public disclosure of proprietary information like voting machine software and source code, the electronic voting process in Montana could be safeguarded and improved.

A Historical Perspective on Montana Property Tax: 25 Years of Statewide Appraisal and Appeal Practice[264]—Karen E. Powell

This article examines the complexity and effectiveness of Montana's unique property tax system which was dramatically changed by the 1972 Montana Constitution. Unlike the prior system instituted by the 1889 Con-

260. Mont. Code Ann. § 47-1-101 *et. seq.* (2009).

261. Brian J. Miller, *The Right to Participate, The Right to Know, and Electronic Voting in Montana*, 69 Mont. L. Rev 371 (2008).

262. Mont. Const. art. II, § 8.

263. *Id.* at art. II, § 9.

264. Karen E. Powell, *A Historical Perspective on Montana Property Tax: 25 Years of Statewide Appraisal and Appeal Practice*, 70 Mont. L. Rev. 21 (2009).

stitution, the state is now charged with oversight of property appraisal for tax purposes.[265] This change, which was prompted by concerns about the inequality of local appraisals, made Montana only the second state to utilize a statewide appraisal system. The 1972 Constitution also directed the Legislature to provide an independent appeal procedure for "taxpayer grievances about appraisals, assessments, equalization, and taxes."[266]

While the revisions in the 1972 Constitution were intended to equalize property valuation and provide taxpayers with an adequate avenue to appeal valuation decisions, the current property tax system has proved complex and inefficient. Montana currently utilizes a unique six-year reappraisal cycle. This long appraisal cycle increases the likelihood that property values will substantially change with each cycle and limits the opportunity taxpayers have to appeal valuation increases. Despite the limited opportunity to dispute valuation increases, the system does allow for numerous levels of appellate review and the Montana Supreme Court has frequently remedied disproportionate tax burdens on uniformity, equal protection, and due process grounds. While a simpler system with a shorter appraisal cycle would likely remedy a number of current problems, the Montana Department of Revenue does not currently have the resources to appraise land on an annual or biennial basis.

265. Mont. Const. art. VIII, § 3.
266. *Id.* at art. VIII, § 7.